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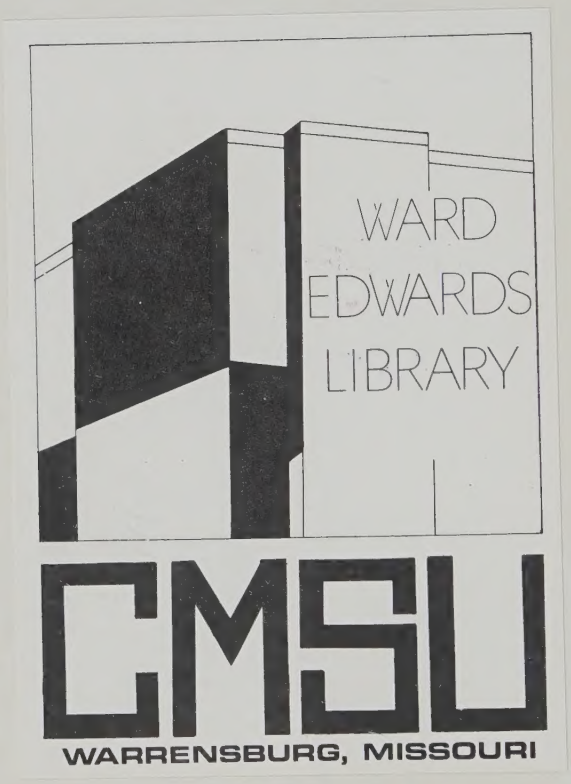
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POLITICS AND CRIMINAL PROSECUTION

BY

RAYMOND MOLEY

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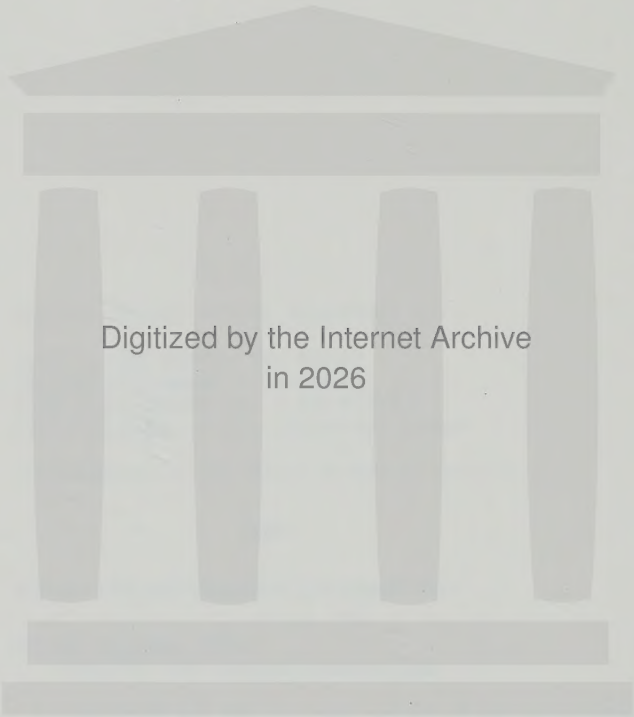

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POLITICS AND CRIMINAL PROSECUTION

BY

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1929

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TO

CHARLES ELMER GEHLKE

FOREWORD

The title of this book is designed to suggest the limited treatment of a very extensive subject. It professes to offer no treatise on the law or practice of criminal prosecution. Neither does it signify another of the familiar "indictments" of criminal justice. I have attempted rather, in this essay, to confine myself to the presentation of evidence of the political factors which enter into criminal law administration in the United States, particularly as they affect the prosecutor. In addition, I have attempted to indicate the very great importance of the public prosecutor, a fact which is particularly American. The sheriff and the coroner, the grand jury, and finally the petit jury, products of a long historical evolution, have quite faded into insignificance. Likewise, both the examining magistrate and the trial judge in state courts partially through their own lack of capacity, partly through legal limitations upon their powers, and largely because they have no means for knowing what they should know about the cases before them, perform no dominant role. In the midst of the decay and impotence of his official associates, the prosecutor rises to a definite mastery. To a considerable extent he is police, prosecutor, magistrate, grand jury, petit jury, and judge in one.

The power which he thus finds ready to his hand is

exercised within the scope of an ample discretion. Cases are dropped how, when, and why he decrees. His discretion, moreover, is exercised within the protective darkness of inadequate records and reports. He is not subject to any important extent to the restraining influence of public and professional scrutiny. Most important of all, the office thus vested with power is in reality sought and used for purposes of partisan politics. Its personnel, methodology and influence is determined by political exigency. Whether this is desirable or not, I do not profess in the pages of this book to decide. I content myself with the statement of the case as I know it. The office of reform I am willing to leave to others. It may be that change is undesirable. That is a question that should be answered only after a careful weighing of all the values concerned.

Limited to this single theme I have found it necessary to impose upon myself very definite limitations. I have given practically no attention to "criminology" in the commonly accepted use of the term. With the causes, effects, the varied manifestations and the treatment of crime I am not here concerned.

Another limitation has to do with the kinds of crimes considered. Attention is centered largely upon the more serious state offenses. Felony prosecutions are emphasized rather than those of misdemeanors. I recognize this limitation chiefly because of the fact that American states have destroyed the meaning of a misdemeanor by attaching the label of "crime" to a vast number of petty offenses which are not viewed by any considerable proportion of the public as morally wrong at all. Therefore, when we

speak of crimes in this book we are for the most part thinking of burglary, grand larceny, robbery and a number of commercial and sex offenses. Finally, I limit myself to the law enforcement agencies of the states rather than of the Federal government.

Much of the burden of detailed citations can be removed from the pages which follow if I indicate in a preliminary and general way the sources from which many of the facts in this book have been drawn. It has been my good fortune to have been associated either in a directing or in a consulting capacity with a number of first-hand studies of the administration of the criminal law, ranging in point of time from the Survey of Criminal Justice in Cleveland by the Cleveland Foundation in 1921 to that of the Illinois Association for Criminal Justice in 1927, and including, in addition, studies by the Missouri Association for Criminal Justice, the National Crime Commission, the Chicago Crime Commission and the New York and Pennsylvania Crime Commissions. The restrictions imposed by my relationship to some of these studies have until now made it inappropriate to venture my own unrestricted opinions as to the conclusions which should be drawn from the data which they contain. In this book, however, it is possible to express frankly my individual and personal views without in any way committing the responsible members of these commissions and associations.

In addition to these sources of information there have been available an admirable study of the criminal courts of Georgia, made in 1924 by the Department of Public

Welfare of that State, a survey of the criminal courts of Cincinnati, made in 1927 by the Cincinnati Bureau of Municipal Research, and the valuable reports of permanent crime commissions in Chicago, Cleveland and Baltimore. To check in some degree the findings of these special studies with conditions in other cities and states, personal visits were made to a number of American and Canadian cities. This book, therefore, while admittedly representing a preliminary and tentative study of the subject, has the measurable advantage of basing its conclusions upon what has actually happened in more than one hundred thousand criminal cases, mostly felonies, all tried within the span of a few years in a fairly representative group of states including both urban and rural jurisdictions, large cities and small, and under conditions imposed by a considerable variety of procedural rules. The cities actually subjected to first-hand study included New York, Chicago, Philadelphia, Detroit, Cleveland, St. Louis, Baltimore, Los Angeles, Buffalo, San Francisco, Milwaukee, Cincinnati, Minneapolis, Kansas City, Seattle, Indianapolis, Rochester, Portland (Oregon), Denver, St. Paul, Oakland, Atlanta, Omaha, Syracuse, Dallas, Rockland, Des Moines, Salt Lake City, Albany, and a number of smaller cities.

Even with such a considerable basis of fact as this, it is not possible to generalize for the entire nation with any degree of certainty. Nothing is easier than to make sweeping statements concerning the operation of governmental agencies, but on account of the infinite varieties of official personnel, popular attitudes, and temporary social and

economic conditions, nothing is more dangerous. It should be remembered, therefore, that where generalizations are made in the pages that follow, they are meant to apply to a preponderance of the jurisdictions mentioned above, and that no such ambitious objective is anywhere intended as a single descriptive term that is true of all parts of a country so large and diversified as our own. In much of the current literature on crime and the criminal law there has been too great a tendency to make unproved and, in many instances, unwarranted blanket statements.

I have frequently given illustrations in which the names of persons and places are withheld. The purpose of this is to avoid needless specific and direct criticism of public officials and at the same time to submit to the reader illustrations which are based upon exact fact. Every effort has been made to give authentic accounts of these instances, however.

I have attempted in this essay to reduce the number of citations and references to a minimum. It is possible to do this because of the pending publication through the Social Science Research Council of a comprehensive bibliography on the entire subject of crime, criminal law and administration. This work is under preparation by Professor A. F. Kuhlman of the University of Missouri, Dean Justin Miller of the University of Southern California and the author of this essay.

Even so limited a quest for material as this small essay represents has been possible only because many experienced and competent hands have helped. It is impossible to mention all—particularly those prosecuting attorneys,

judges and police officials who have without exception given generously of their time and patience to what must have seemed to many of them a somewhat academic and amateurish search for impertinent facts.

To Professor C. E. Gehlke of Western Reserve University not only this book but other contemporary efforts to apply standards of realism to law administration owe a substantial obligation. It was due to his suggestion that the first scientific study of criminal justice was made and his painstaking and resourceful skill in the use of statistical method has marked many similar studies since. For these reasons and for the additional benefit of helpful advice in planning this book I find myself deeply in his debt. I am also indebted to Dean Justin Miller of the University of Southern California Law School, Professor John B. Waite of the University of Michigan and Pendleton Howard of Columbia University, who have read portions of the manuscript and have given specific assistance of great value. Miss Audrey Davies was very helpful in assembling and verifying data and in the planning and formulation of a number of chapters. My colleagues, Professors Howard Lee McBain and William Haller, read the entire manuscript, and offered suggestions of great value. For material assistance in gathering data and for freedom from excessive academic routine I owe a deep obligation to Barnard College, to the Law School and to the Council for Research in the Social Sciences of Columbia University.

R. M.

New York,
January, 1929

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POLITICS AND CRIMINAL PROSECUTION

POLITICS AND CRIMINAL PROSECUTION

CHAPTER I

SYMPTOMS

IT may be that when the history of American criminal law enforcement in this generation is finally written the name of William McSwiggin will be the emblem of a portentous relationship—the connection, if not the alliance, between modern crime and politics. And not because this unfortunate young man was himself guilty of wrong. No evidence has been presented that this son of a Chicago police official, who studied law, and like many a successful Chicago politician started his career as an assistant state's attorney and whose energy won him the title of "hanging prosecutor" because of his vigor in certain aspects of his work, was guilty of any evil except that of keeping bad company.

It seems that early one evening in April, 1926, McSwiggin, with two companions, was standing before a saloon in Cicero, a "tough," industrial suburb of Chicago. A rattle of machine gun fire burst from a passing automobile and the three men were killed. Murders committed in this manner had been common. There had been

twenty-nine in the four months prior to this incident and two hundred in four years, but in this case the attack had gone beyond the civil warfare of hoodlums. It had reached a highly important and responsible public office. The news constituted a country-wide sensation and in Chicago brought about consequences the full meaning of which is not yet wholly apparent. Let us review what followed and then draw a number of conclusions.

The coroner was a political opponent of State's Attorney Crowe, the political patron and official superior of the murdered prosecutor. He caused the appointment of a coroner's jury consisting of six very prominent Chicago business men. This jury heard many witnesses and held many meetings, but as this account is written thirty-one months later it is still officially existent and it is still seeking a valid explanation of the tragedy.

Within two weeks after the murder an eminent member of the Chicago Bar, who was at the time President of the Union League Club, demanded publicly that because of the political activities and connections of Mr. Crowe, a special grand jury should be called to act independently of the state's attorney. Mr. Crowe replied with asperity that he was more anxious than anyone else to avenge the death of his friend and assistant, that he was actively investigating the crime, and that he needed no assistance from "notoriety seekers," "self-appointed investigators," and "officious meddlers." He thereupon requested and secured the appointment of a special grand jury and called to his assistance the attorney general of Illinois. Mr. Crowe's critics, including the most powerful

newspapers of the city, complained that the "gesture of Mr. Crowe was insufficient, that the McSwiggin murder was probably symptomatic of deeply hidden conditions in political life, and that Mr. Crowe himself was too deeply involved in politics to conduct a satisfactory examination." Nevertheless, the state's attorney, assisted by the attorney general, proceeded with the hearings and, while they did not indict the murderers of McSwiggin, they issued a report which has added materially to the informative literature of Chicago's crime conditions. After the life of this grand jury had expired, there were called in succession four more special grand juries, all of which had under consideration a wide variety of related subjects, including election frauds, official bribery, gang murders, and police "protection." In addition to the coroner's jury and the five state grand juries, a federal grand jury investigated prohibition violations which were thought to be related to the murder of McSwiggin. The seven juries did not find out who killed McSwiggin, but the net result of their investigations was a dramatization of the whole problem of crime and its insidious relationships, that provided a significant educational experience for the people of Chicago and to a degree for the entire American public. Because this dramatic recital, shown upon a background so tragic and pregnant with human interest, is typical of conditions in many of the great cities of the United States, it will be helpful in beginning a discussion of the details of law enforcement to set forth some of the things that the city of Chicago learned from the seven investigations of the mysterious fate of the luckless McSwiggin.

I. *The Wars, the Methodology and the Professional Etiquette of the Underworld*

A persistent theory as to the motives for the killing of McSwiggin was that the attack was an incident in a prolonged "beer war." This conflict rose out of the fierce competition between rival gangs that sought the enormous profits that were possible through the supplying of alcoholic beer to the saloon-keepers of Chicago and its suburb Cicero. It was a war that already had taken the lives of a great many gangsters and which, it should be added, was not terminated by the tragedy which we are discussing. One of the grand juries said that gang war "has been peculiarly vicious and has produced many murders by gangsters because the stakes played for have been great. Gang after gang has been wiped out by internecine warfare." The investigations revealed the ease with which criminal gangs were able to purchase machine guns for their murderous purposes, the use of high-powered automobiles that in almost every test were superior to those used by the police, and the ruthless cruelty of the contending underworld factions. It is quite probable that many persons in the city of Chicago must have intimate and exact knowledge as to the circumstances surrounding the murder of McSwiggin. The rule of silence, however, maintained by all those who have any such knowledge in this case is a simple example of the difficulty law enforcement encounters in attempting to learn facts concerning criminal activities from those who are involved in them. Another example of this was

provided by the murder on a very busy street corner on the afternoon of September 9, 1928, of one Lombardo, and the fatal shooting of his bodyguard. The latter, who had seemed to have every human reason to reveal his assailants, refused to tell the police the names of those who had assaulted him and he died without offering a single clue.

II. *The Blackmailing of Business*

The systematic blackmailing of business in Chicago has proceeded from the lowly tailor and hat cleaner to very high places in the industrial world. It has become publicly known that certain tradesmen have been compelled to organize and to employ professional gun-men to protect them. In some instances, protection consists in the actual employment of gun-men to drive away attacks, and in other cases it is the plain payment to gang leaders of large amounts of money. It is unnecessary to set forth in detail here what any business man in Chicago knows quite well, that the very large businesses are subjected to political blackmailing in ways which are different only in degree from that suffered by the cleaners and dyers and candy-makers.*

* The following editorial comment from the *Chicago Tribune,* November 3, 1927, indicates the seriousness of small business blackmail:

"State's Attorney Crowe has caused the arrest of the men accused of promoting the Association of Candy Jobbers by means of violence and threats of violence. In addition he has created a bureau in his office to deal with complaints from persons threatened by organizers of petty trade associations. He has pledged himself to put an end to the extortion of dues, initiation fees, and fines by sluggers.

"The state's attorney's announcement is reassuring. The organizers and

III. *Official Improprieties*

The presence of McSwiggin in such company at such a time and place is itself suggestive of curious habits for an important law enforcement officer even if the theory that he was seeking information to be used in prosecution is accepted. The undisputed facts throughout the investigation indicated common activities of important officers which we shall charitably call "careless." Out of the investigations came cancelled checks which proved that sums of money were paid to officials. The first grand jury also reported that "the vicious administration of the pardon and parole laws has been one of the great contributory elements in making the existing situation." Throughout the ranges of officialdom there appeared questionable relationships with the underworld. The names of McSwiggin's companions were Duffy and Doherty. The first was a Crowe precinct worker, and the second was a member of a gang which was known to have worked for Crowe. The day before the murder Duffy and a number of other well known underworld characters, wearing badges as authorized watchers of the Crowe-Barrett machine, had been present at the elec-

their sluggers are not politically impotent. They have votes and they control votes. Possibly for that reason office holders have frequently failed to view their activities as menacing and the organizers have been able to coerce peddlers and small merchants of a dozen sorts into associations. Sometimes the members get extra legal protection from unfair competition in return for their initiation fees, dues, and fines, but in recent months the tendency appears to have been toward the organization of associations whose sole purpose is to provide an income for the organizer. A tradesman who hesitates to join the association is threatened a beating or even with death and occasionally the threat is carried out as an object lesson to others."

tion commissioners' office at a canvass of the primary vote. This fact and the presence of McSwiggin in their company established the authenticity of the relationship between Duffy and Doherty and the officials of the city of Chicago. On the other hand, the contacts of the same two individuals with the underworld were shown in many ways. While the truthfulness of a character such as the famous Al Capone may be seriously questioned, his statements made in the course of this investigation are significant. "I'm no squawker, but I'll tell you what I know about this case. All I ask is a chance to prove that I had nothing to do with the killing of my friend McSwiggin. Just ten days before he was killed I talked with McSwiggin. There were friends of mine with me. If we had wanted to kill him, we could have done it then and nobody would have known. But we didn't want to. We never wanted to. Doherty and Duffy were my friends too. I wasn't out to get them. Why, I used to lend Doherty money. I wasn't in the beer racket and didn't care where they sold. Just a few days before that shooting, my brother Ralph and Doherty and the O'Donnells were at a party together."

IV. *The Weakness of the Police*

Al Capone is one of the best-known figures in the city of Chicago. His whereabouts are almost always definitely known. He lives in large and well-appointed suites in hotels which he controls. He is never alone and at times his bodyguard numbers ten or more. Almost every

experienced policeman in Chicago has seen him. The fact is, however, that the moment that the news of McSwiggin's death appeared and there was talk of connecting him with the crime the police were unable to locate him. Various reports were issued to the effect that he was hiding in New York, or in the woods of northern Michigan. After a period of three months, however, he surrendered with appropriate dignity and offered such evidence as he felt wise. During the summer of 1928 a warrant was outstanding for the arrest of one Saltis, another very well-known figure in the underworld of Chicago. In order to taunt the police with implications of inefficiency, the *Tribune* printed in a box daily the statement that Saltis was still at large, and this series of notices continued for more than one hundred days. Either through deliberate purpose or mischance or plain inefficiency, the police of Chicago were unable, it would seem, to solve the most simple problems of locating well-known characters. It is impossible to consider the question of police administration here, but it should be added that a careful study of police records and reporting by the Chicago Crime Commission * pointed to the most

* Published in May, 1928, and thus summarized editorially in the *Chicago Tribune* on May 14th: "But it was not until the primaries were over that the real source of error in Chicago figures on crime appeared, and that was the discovery that members of the police department have been engaged, sometimes officially, sometimes as individuals, in the practice of suppressing the truth about the spread of criminality, especially under the Thompson administration, and to hide their failure to check crime. Major crimes have been kept off the records unless there was an arrest and the case could be listed as 'cleared up.' Other serious crimes have been recorded, but under the aliases of petty misdemeanors. This system of suppression, of building up a false efficiency record, has been extended to every activity of the department. With such a system in vogue, the claims of the department that it has cut down crime, can be catalogued as pure fiction."

startling examples of plain dishonesty in the giving of information to the public concerning the amount of crime. Throughout the investigations the impression grew that the police of Chicago, while in the main honest and well-intentioned, were badly organized, indifferently disciplined, subjected to political influences, and wholly unable to provide protection for the city. Finally, in a report issued by a special grand jury in August, 1928, the department was officially charged with being "rotten to the core."

V. *The Attack upon Public Justice*

Not only were the relationships between agencies of law enforcement and the underworld revealed, but serious attacks upon the foundations of the administration of justice were indicated. The report of a special prosecutor in charge of the fourth grand jury stated that during the progress of the trial of certain gangsters one Hymie Weiss, a notorious character, was murdered and in his possession at the time of his death was found a list of the jurors who had been selected to try his friends, "as well as the identical copy of the list of State's witnesses that had been furnished to counsel for the defendants by order of the court." Mr. McDonald's report further stated that in the same trial some of the state's witnesses had been threatened with violence in case they testified and others had been approached with offers of bribery. The effect of these measures of bribery and intimidation is indicated by the fact that two of the more important

witnesses disappeared and the immediate members of their families refused, or were unable, to give information as to their whereabouts. This tampering with the administration of justice is very common in Chicago. Innumerable instances might be cited. It has become so common that it is almost impossible to secure conviction of certain powerful personages in the underworld. In a sensational trial which is proceeding in the autumn of 1928 it has been necessary to remove state's witnesses from the state entirely and maintain them at the expense of the prosecution far from danger and temptation. In many instances in the past few years in Chicago the process of intimidation has resulted in the actual killing of witnesses.

VI. *The Attack upon Popular Government*

Whenever an investigation proceeds far in Chicago it inevitably comes to concern itself with election frauds. It seems that the ultimate problem involved in crime and politics is the hold which corrupt political groups maintain over the ballot. In fact, the second, third, and fourth special grand juries concerned themselves almost entirely with serious election frauds. The fourth McSwiggin grand jury voted twenty indictments of clerks and judges of elections. After the primaries of 1928, in which Crowe was defeated for renomination, came another series of special grand juries with Frank J. Loesch, a veteran attorney and President of the Chicago Crime Commission, as special prosecutor. The result was the indictment of a

very considerable number of politicians and gangsters, chiefly from the "bloody" Twentieth Ward. One Octavius Granady, a negro lawyer, offered himself as a candidate for the ward chairmanship against Eller and was killed by gangsters on primary day.* The primaries were marked by many other acts of violence, particularly in the Twentieth Ward. It was charged that eighteen poll watchers and election clerks opposed to the Eller ticket were kidnapped and held in a house exactly across the street from the residence of Eller. That Crowe was the beneficiary of the activities of Eller is shown by the fact that the Twentieth Ward gave him an overwhelming majority. "I can always carry that ward by 10,000 for myself, Mayor Thompson, Mr. Crowe or anyone else in our Republican America-First Party," said Eller.† After an investigation of these activities indictments were returned for more than sixty politicians, gangsters and hoodlums including Eller, his son Judge Eller, J. P. Leonardo, a member of the state senate, and Oscar De Priest, a negro member-elect of the United States House of Representatives. The final stronghold, therefore, of organized crime is actual control over processes of popular election. The underworld thus reaches the most vital spot in law enforcement, the means through which law enforcement is controlled by the public.‡

* "He wasn't killed in my ward at all," Eller is quoted as saying. "He got chased out of it, and was shot in the Twenty-fifth."—*N. Y. Times,* August 5, 1928.

† *N. Y. Times,* August 5, 1928.

‡ Perhaps the reader ought to be informed concerning the various theories as to the actual killing of McSwiggin, although the immediate circumstances of his death are insignificant in comparison with the large questions of

VII. *"Pineapple Politics"*

The use of bombs by the underworld was no new experience in Chicago. Early in the year 1928, however, bombing became a factor of great significance. For some reason not thoroughly understood and by persons whose identity has never been determined, a series of bombings began in January and continued for more than two months. Bombs were thrown at the homes of a number of political leaders, including those of the City Comptroller, State's Attorney Crowe's secretary, a well-known political judge, and finally Senator Deneen and Judge Swanson, the Deneen candidate for state's attorney, opposing Crowe. This outburst of violence had political results of the greatest importance. It was interpreted in all sorts of ways. Some said that the bombs were thrown by gangs who had been deprived of protection, as they thought, unjustly. Others interpreted them as signs of dissatisfaction on the part of the underworld for what was alleged to be more vigorous prosecution of offenders. It remained for Mr. Crowe himself to make the most

public policy involved. There were three theories of the killing. One was that he was killed by accident or design in the performance of official duty while attempting to gather information from members of the underworld for the purpose of preparing a number of pending prosecutions. Another theory held that he was killed by accident by gangsters who were engaged in the beer war. The third theory held, in the words of the *Chicago Tribune*, that "throughout the four months of Grand Jury investigation there has run the opinion that McSwiggin was killed because of what happened in Cicero on Election Day." Sergeant Anthony McSwiggin of the police department, father of the murdered man, named four notorious gunmen as the slayers of his son and insisted that he had positive inside information which he had given to proper authorities. Mr. McDonald, special prosecutor, stated "I know who killed McSwiggin but I want to know it legally and be able to present it conclusively."

astonishing political error in his whole career by ascribing the bombing of the Deneen and Swanson homes to the Deneen faction itself. This explanation by Mr. Crowe made in the midst of a fierce primary fight unquestionably turned thousands of voters away from Crowe, and the result was the nomination of Judge Swanson by a tremendous vote and the temporary termination of the Crowe power in Chicago politics.

Any intelligent appraisal of this series of bombs must include certain broad generalizations. The first is that it is not customary for the underworld to use these methods to fight agencies of law enforcement even when these agencies are vigorous and honest. The underworld recognizes that such attacks are in the long run unwise because they have the effect of galvanizing public opinion to such an extent that official action is rendered much more vigorous, and ultimately crime becomes more dangerous to those who commit it. Therefore, it is unreasonable to hold that the bombings were merely acts of retaliation for vigorous law enforcement. They were probably signs of some deep-seated activity which was, in part, political in nature. It is possible that some who were bombed as well as those who did the bombing understood clearly and in perfect detail exactly what had happened, and why it had happened. From the standpoint of public interest these bombings were the most sensational and striking of the series of events which followed the death of McSwiggin. There is ample evidence in the newspaper comments of that time and in the discussion which was widespread among thinking and re-

sponsible citizens that lawlessness had now become intolerable. If the high officials in government were unable to protect themselves against what seemed to be the boldest kind of attacks, how could they be expected to prevent lawlessness from becoming still more dangerous? If they could not save themselves how could they be expected to save others? The result was a political upheaval of major proportions in the primaries of April. The Deneen faction, supported by the better newspapers and many of the leaders of the bar and of business, was successful.*

¶

It was undoubtedly because of the extraordinary fact that a judge was tried for murder that the public in

* The *Chicago Tribune,* February 25, 1928, offered this editorial interpretation of the bombing:

"The public has been calling on the officials to stop bombings for a long time and will now recall with some satisfaction and a sense of fitness the adage about being hoist by one's own petard. It feels that these semi-official visitations of the pineapple industry are matters the victims must settle between themselves and their consciences. The public agrees with Mr. Crowe that there must be something 'definitely political' about these bombings, but it doesn't mean that the way Mr. Crowe does. Mr. Crowe's political opponents are not so fanatic as to use bombs. Mr. George Brennan sometimes indulges in a practical joke, such as giving money to the Better Government league, but he has yet to play with explosives. The reform leaders sometimes blow themselves up, but have never so far been accused of bombing even a disorderly house, let alone a politician. The public will admit the bombings are probably political, but not that way. . . .

"Further still, why give the rest of the country so much amusement? Concede the humor of the picture of Chicago politicians being tossed out of bed by bomb explosions, but enough is enough. Chicago has had burlesque until it is sick of it. Now it is to have fireworks. It will thank Mr. Fitzmorris, 'Doc' Reid, Judge Sbarbaro, Mr. Barsotti, Mr. Cuneo, as the political gentlemen already bombed, and Judge Barasa, Mr. Morrie Eller and Judge Manny Eller, as gentlemen mentioned as future possibilities, if they will hold that suggested meeting with Commissioner, former Chief, Hughes and try and find out who is doing the bombing so that it can be stopped."

another great city learned so much about criminal law enforcement. In May, 1920, William H. McGannon, Chief Justice of the Municipal Court of Cleveland, spent an afternoon and evening with a friend named Kagy. They visited a number of road-houses in and near the city and at their last stop not many minutes before midnight, they met one Joyce, a well-known person, formerly the proprietor of a downtown saloon. Joyce was very intoxicated and McGannon and Kagy permitted him to occupy a seat in the car. Some time later at a downtown corner, a block or two removed from the bright lights, but in the heart of the city, Kagy, while standing on the sidewalk near his car, was fatally shot. Joyce was near by, but apparently too intoxicated to know what had happened. The whereabouts of Judge McGannon at the time of the shooting were then and to this day remain undetermined.

Certain facts were clearly known from the beginning. McGannon had been in the company of the doomed man up to and after their departure from the saloon where they had met their intoxicated friend. This was only a short time before the shooting four miles away. The car belonged to McGannon but was in the possession of the murdered man for a few days for repairs. Three men had been seen near the car, two of whom were clearly identified but the third was just a "large man" who had disappeared after the shot. McGannon gave out the story that he had left the car some three blocks before it reached the fatal corner and had walked through several downtown streets and had taken a car for home. These

were the known circumstances when prosecutions began three months after the murder.

The details of this tragedy and the series of incidents which ensued constitute an amazing story. We are not concerned here with the story of the crime, as such, but with the events which illustrate the state of unpreparedness in which the police and the prosecuting agencies found themselves.*

When the shooting took place five policemen were within two blocks of the fatal spot. Two of them walked past the judge's car and heard two of the three persons standing near arguing earnestly. They apparently thought nothing of heated arguments on dark corners at midnight; so they passed on. Anyhow they were in mufti as they were new to the police force and the department was short of uniforms. They did nothing until the shots caused them to retrace their steps. Two other policemen passed on the opposite side of the street, not a minute later. They too were recalled by the shot but suddenly remembering that this particular street was outside of their beat they did not cross the street for fear of criticism. A fifth officer, a sergeant, at the moment off duty, came and took charge of the injured man. While it may seem that what has already been told of the effectiveness of the police indicates almost a maximum of possible error, there were still more blunders. The police officer who took the dying man's declaration the next day in the hospital made an error which resulted in the exclusion of the statement in the subsequent trials. Finally, certain

* This case made possible the Cleveland Crime Survey. See p. 37.

detectives assigned by the police department to assist in the subsequent prosecution of the case were said to have reported the secrets of the prosecution to the defense. The man under suspicion and subjected to trial had been a stern police magistrate. He had vigorously dealt with the persons arrested and charged with offenses by the police. He was, therefore, well liked by the department, and many incidents throughout the months of stress which followed showed that members of the force were loyal to their old friend. This, however, does not explain fully the incidents above narrated. They were, except for the one last mentioned, probably due to plain ineptitude.

The prosecuting attorney's office, to which a thoroughly aroused public looked for action, was in poor shape to cope with a case so likely to be involved with formidable, hidden political forces, and so full of explosive possibilities. Only a year before, a special grand jury, the counsel for which had been a former United States district judge of high reputation at the bar,* had reached the following conclusion as to the Cleveland prosecutor's office:

"The conduct of the county prosecutor's office, as administered at the time of the special investigation and from good and verified testimony covering a considerable period prior to the investigation, merits little of praise.

"Evidences of lack of system, inattention, delays, carelessness and negligence in the preparation of cases were and are plentiful and conclusive.

* Judge William L. Day, son of the late Justice William A. Day of the United States Supreme Court.

"Indictments were frequently lost or mislaid, records were poorly and carelessly kept, assignments were handled in major part by a girl clerk, who exercised the right and power of passing cases and allowing postponements. The recommendation for nolle was not given the restraint and safeguard it should and must always have. . . .

"As an evidence of the moral shortcomings of the present force, in addition to its business laxities, it must be stated that one of the higher officials was addicted to gambling, in semi-public places, and other forms of questionable diversions—all more or less in conflict with the laws which he is expected to uphold by virtue of his office.

"The office has steadily lost the confidence of the community and the bar. . . .

"The present prosecutor should not continue in office and should resign or be removed by due process of law.

"The jury feels that one of the conclusive contributors to Cleveland's reputation as a city of laxity in law enforcement, and the consequent influx of criminals of more or less dangerous character, is due to the shortcomings of this official. No evidence of criminal act or neglect has been found, but the indictment of inefficiency and insufficiency is established. . . .

"He has been unfortunate in his choice of companions, both before and after his selection as county prosecutor. . . .

"Further derelictions are noted in laxity of action on forfeited bail bonds and the almost complete failure to recognize and prosecute perjurous bond signing.

"The spirit of the chief, as in any organization, has been reflected in the force below him—the collective effort can be no greater or more efficient than that of the directing head.

"Being a good fellow and trying to help one's friends is not necessarily the indication of a successful conduct of the office of prosecutor and has resulted in lack of confidence, unfavorable comment and remarks of suspicion of criminality.

"The special grand jury must, however, declare, in answer to

the remarks of such suspicion, that no evidence has been presented to sustain them." *

After defying this recommendation for some months, he had resigned, and there had been appointed in his place a very young lawyer, formerly an assistant prosecutor. This inexperienced young man was in office when the incidents which we have described took place. It was freely charged by responsible people that the office was still disorganized, ineffective, ridden with politics, and hopelessly behind in its work. But action was demanded, and after four months' delay it secured the indictment of Joyce. He was defended by a veteran practitioner who had resigned a judgeship a year or two before in order to make the income at the bar which his known talents assured. The state's effort was a feeble and hopeless gesture, and acquittal was the prompt result. Then there was more delay and finally Judge McGannon himself was indicted.

The defense was an alibi, generously upheld by a considerable number of witnesses. It appeared that many people, including several patrolmen and detectives, had seen the accused man in his nocturnal walk from automobile to street car. His presence on every street which he described in his alibi was covered by witnesses. He was seen in the street car which he had taken to his home. Again in this trial incompetence fell before skilled defense. Another veteran of the bar defended the judge. The state's witnesses were confused, dazed, and made to ap-

* *Report of Special Grand Jury on Crime Conditions in Cleveland,* June 25, 1919; published by the Chamber of Commerce of Cleveland.

pear ridiculous. The alibi had been built into a flawless tissue of circumstance. The jury disagreed. Another trial ensued. The same wretched drama was enacted, except that in this instance the state was still more ineffective. Acquittal resulted and the murder stands unexplained to this day.

Not long after the trial new sensations filled the daily press. There had been perjury. A newspaper secured the confessions of witnesses who had been bribed. Two reporters said that they had been approached by the representatives of the accused magistrate, and had been paid to secure the retraction of the testimony of one of the state's principal witnesses. Again McGannon was indicted, this time for perjury. At last the local bar association was aroused to the sordidness and disgrace of it all, and they provided a special prosecutor to assist the newly-elected successor to the office. In this trial the state prevailed. McGannon was sent to the state prison for a term, for perjury.

If this case were not so forceful an illustration of official incompetence, it would serve no useful purpose to prolong the memory of McGannon's disgrace even during the momentary life of this book. No judicial determination ever proved that McGannon was guilty of murder, and it would be difficult to find many people in the whole city who believe that he was guilty. He paid a great price, a greater one than most convicted murderers pay. Disgrace, loss of employment and of savings, physical and mental suffering, have marked him and his subsequent career. This present raking of the embers is

not intended to prove that he, a guilty man, escaped punishment. The author, perhaps it is best to add, is convinced that the curious alibi was the hastily improvised device which an innocent but confused man seized upon when faced with the grim reality of possible disgrace. And once adopted it was maintained because an amended story would not be believed by an excited public which, in the wisdom of democracy, we permit to sit on the throne of justice.

¶

These cases served to dramatize for the people of Cleveland and Chicago certain aspects of criminal law enforcement. Police were in both instances shown to be wholly unable to meet an emergency. But to say this is to say that they were unequal to their normal responsibility, because police are needed in large part to meet unusual situations. In both instances they were shown to be the prey of politics, departmental favoritism and religious and fraternal factionalism. Their failure was not so much moral as intellectual. They were, as Mr. Raymond Fosdick had occasion to say pointedly of the Cleveland police in 1921, "working in a rut, without intelligence or constructive policy, on an unimaginative, perfunctory routine." While in the main honest and well-intentioned there is small question but that both departments were tainted with corruption.

In spite of stupid police administration these cases would have probably resulted quite differently had there been satisfactory prosecuting machinery. Public prosecu-

tion in both cases was shown to have been weak, ineffective and ridden with politics. More serious still was the complete lack of confidence with which it was regarded by the leaders of the organized bar. In Cleveland, when a conviction was finally secured, it came as the result of the efforts of special legal talent employed by the bar association. In Chicago, such "meddling" was bitterly resisted. The relations between Mr. Crowe and the bar association have for a long time been hostile. Finally in 1928 he resigned from that body and according to its President the resignation was accepted "with unanimity and alacrity." * In both cities the attack upon the administration of justice by underworld methods was notable. Bribery, perjury, intimidation and other crimes against government and justice were common. Of special significance is the fact that in both cases bootlegging and related activities color the background. It was shown that in both cities old vicious forces had with the coming of prohibition assumed new forms and seized upon new instrumentalities. Corrupt gang activities, which twenty years ago were related to the protection and exploitation of prostitution and small gambling are now related to liquor law violation, racketeering, hijacking and a very much more expensive form of gambling. These activities have provided the underworld many times the profits of twenty years ago.†

* *N. Y. Times,* August 5, 1928.

† Two theories are current concerning the relation of prohibition to crime. One is that it has been the cause of much more crime and corruption; the other holds that while bad conditions exist in several cities, the cities where conditions are satisfactory are in the majority. For the latter view see r

It is impossible to review these cases without reaching the conclusion that a single immediate cause may be found in all the manifestations of failure with which they were marked. The police were badly trained and disciplined because the rule of politics does not permit the retention of such leadership as will train, discipline and direct police departments. Prosecution was feeble and incompetent because prosecutors' offices were political agencies rather than law offices. Insidious relationships existed between shady characters and public officials because votes and party funds were involved. The administration of justice was infested with perjury, intimidation and bribery because the personnel of law administration was infested with politics. The attack of the underworld upon popular government through fraud and intimidation at elections was one of the means to the larger end, the control of those who are successful at such elections. As we shall see in certain chapters that follow, there are many deep-seated factors involved in the defects of criminal law administration, but the motif in the present disorder is, we believe, political.

Another consideration is still more serious. These cases claimed public interest because they were pregnant with sensational matter. They moved a public which apparently was unable to manifest even a passing interest in less sensational but none the less significant proofs of evil conditions. How much of the popular uproar which resulted was moral indignation and how much was mere

report submitted to the Criminal Law Section of the American Bar Association in 1928 by a committee under the chairmanship of A. V. Lashly.

excitement is a question cynical but pertinent. A consideration of politics as a factor in law enforcement always, when nicely analyzed, leads to a consideration of the public, its habits and its opinions.

CHAPTER II

PERSPECTIVE

IF the Forty Thieves, whose names are associated with Ali Baba, had been arrested in an American city, only six, as a discerning reviewer has pointed out,* would have been punished. With certain limitations this is not an ineffective way to call attention to the fact that of those arrested for crimes, only a small minority are convicted and punished. A large majority of felony cases never reach a trial by jury and a considerable majority never reach a sentence. They are eliminated through the many devices by which criminal procedure permits those accused of crime to be released. In New York City in 1926 the percentage of those arrested who were finally sentenced for the crime charged, was about twenty. In Cleveland from 1920 to 1926, the average was about thirty per cent. Available data from other cities indicate that these cities are typical. The data in the following table, assembled from a number of cities, provide a specific measure of the cases dropped at each step in the criminal process.

Such tables as the one on page 28 have quite appropriately been called "mortality tables," the term being

* "Justice in the Stocks," by John W. Love in *The Survey Graphic*, Vol. I, p. 144.

PERCENTAGE OF FELONY CASES ELIMINATED IN VARIOUS STEPS OF PROSECUTION

	N. Y. City 1925	Chicago 1926	St. Louis 1923-24	Kans. City 1923-24	Cincinnati 1925-26	Cleveland 1927	Baltimore 1927	Milwaukee 1926
Felony Arrests[1]	100	100	100	100	100	100	100	100
Elimination by refusal of warrants	40	18						
Eliminated in preliminary hearing	58	49	17	41	55	26	22	17
Eliminated by Grand Jury	12	11	3	2	12	12	5	
Eliminated in Trial Court	8	20	12	20	8	9	14	19
Guilt Established	22	20	28	19	25	53	59	64
Eliminated after established guilt	5	5	3	2	7		8	28
Punished	17	15	25	17	18		51	36

[1] Pending cases not included.

Sources: N. Y. City, *N. Y. Crime Commission Report* 1927, p. 54; Chicago and Milwaukee, C. E. Gehlke, *Tentative Draft of Report on the Disposition of Felony Cases in the Courts of Illinois*, Table I-A; St. Louis and Kansas City, *Missouri Survey* (1926), p. 291; Cincinnati, Cincinnati Bureau of Municipal Research, *Pamphlet No. 5*, May, 1928; Cleveland, Cleveland Association for Criminal Justice, *Fourth Quarterly Bulletin*, Dec. 31, 1927, p. 2; Baltimore, Baltimore Criminal Justice Commission *Annual Report*, 1927.

borrowed from the life insurance actuary. They show the proportion of cases which are terminated in each of the various stages of procedure and thus indicate the extent to which a sifting process is applied to criminal cases which have been initiated. They indicate that a very considerable number of cases are terminated before they reach trial.

While the great "mortality" of criminal cases has been only recently definitely and statistically determined, sophisticated observers of criminal procedure have known of its existence for a long time. Many explanations have been offered. Perhaps the most generally accepted one is to ascribe the striking difference between arrests and convictions to "inefficiency." For example, the late Herbert S. Hadley, whose public life included service as prosecutor of an urban county, as attorney general, and finally as governor, in writing of this subject, expressed the following opinion:

"Stated in terms of percentages, the result is that our system of apprehending and prosecuting those guilty of criminal offenses is only from 5 per cent to 10 per cent efficient; considering those apprehended and indicted for major offenses it is only from 25 per cent to 30 per cent efficient, and including those tried for major offenses about 50 per cent efficient. Such figures stated in the abstract oftentimes mean little to the casual reader, but if he should stop to consider a similar result in the conduct of a business such as banking, transportation or manufacturing with a percentage of efficiency from only 5 per cent to 50 per cent, he could more clearly realize the seriousness of the problem that confronts society today, depending as it does for the protection of life and property upon a system of apprehending and prosecuting

violators of the law which is from 50 per cent to 95 per cent inefficient." *

A number of almost convincing arguments may be advanced to support Hadley's view. It is possible that many innocent persons are being arrested. It is also possible that many guilty persons who are arrested are turned loose because the police cannot get the evidence necessary to convict them. It is also possible that many persons are turned loose because prosecutors, judges and juries are inefficient. The tabulations which we have shown, however, do not provide a key to the relative extent to which these possibilities are true. It must also be recognized that the cities listed above in which the greatest percentage of convictions were obtained, are reputed to be possessed of the most satisfactory police and prosecuting machinery. This is especially true of Baltimore and Milwaukee.†

In spite of these arguments, however, it is doubtful whether we should accept the Hadley thesis. In the first place, there are many factors to account for the "loss" of cases which do not involve standards of efficiency at all. Differences in administrative methods make it very unwise to use percentages of convictions as a basis upon which to compare cities. Moreover, a "conviction" may be a plea to an offense less than the original charge. Thousands of such "convictions" are included in the figures for New York and Chicago, and it may be that they are

* *Missouri Crime Survey*, p. 350.

† This judgment is my own after personal observation supplemented by somewhat extended inquiry. I venture it merely as an opinion.

included in the Cleveland figures which we have used above. Unless allowance for this is made it is useless to talk of "convictions" as measuring efficiency. An additional danger in such a use of the term is the emphasis which it places upon mere punishment as a remedy for crime. When we encourage a prosecutor to feel that his work is to be measured upon the basis of convictions, he may use very improper methods in securing pleas and verdicts of guilty. A conviction secured under such circumstances can hardly be attributed to efficiency. It would be just as reasonable to judge the efficiency of the police by the number of persons arrested.

The most unsatisfactory feature in the "inefficiency" explanation, however, is that it oversimplifies a very complex problem. Some notion of its complexity may be gained from a general consideration of factors which play a part in the termination of criminal prosecutions. It is probable that most of the "mortality" results from differences of opinion among police, magistrates, prosecutors, judges, and jurors. These differences of opinion are accentuated by personal interest. The police are likely to overestimate their own work as it is represented in a prepared case. Magistrates do not want the cases which they bind over to be "no-billed" by grand juries; grand juries do not want their indictments to result in acquittals, and trial judges do not want to permit cases, in instances in which acquittals are likely to result, to go to trial. Thus, where bias exists it largely favors the accused. In addition to the honest differences of opinion which exist among the agencies of law enforcement, there is the constant effort on the

part of these agencies to shift responsibility. A police department is sensitive to the pressure of public opinion and is always able to increase the number of its arrests and thus to shift responsibility to the courts in doubtful cases. The same thing is true of the magistrates and the grand jury. In all parts of the criminal process there is the constant influence of politics and private favor which brings about the termination of many prosecutions against those who have powerful friends and "connections." After considering the multiplicity of forces which play a part in the disposition of cases, one is likely to wonder why the proportion of "unsuccessful" prosecutions is not still higher. The complex nature of these forces and the many agencies and elements which are involved offer a serious warning that we should be careful not to draw conclusions which are too general. There is need, therefore, in arriving at any understanding of the administration of criminal justice to proceed with the utmost caution and to base conclusions upon as ample a supply of specific data as can be assembled.

Conclusions are likely to be drawn from wholly inadequate facts. One trouble is that the public gets a wholly distorted impression of the operation of criminal justice from the newspapers. Criminal law enforcement suffers much because it is so interesting. The press concerns itself with the unusual crime or the sensational prosecution, and the public gets its impressions from such accounts. On the other hand, academic consideration of law enforcement has generally been a consideration of law as it is written in the books, lacking the infinite variations of the

law in practice. In an epoch making address before the American Bar Association more than twenty years ago, Dean Roscoe Pound phrased this in the following terms:

> "But if we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one." *

An overwhelming majority of the cases with which criminal law is concerned finds its way into neither the newspapers nor the appellate reports. These cases, rarely considered by the public or by students of law, actually set the standards and shape the methods of the many governmental agencies charged with criminal law enforcement. Some idea of the significance of these cases can be gained from a consideration of their vast number. In the two years ending June 30, 1926, the state of California returned 14,985 felony informations, of which 5,765 were in Los Angeles alone. 19,842 preliminary hearings in felony cases poured through the Chicago Municipal Court in 1927. The same court in the same year summarily disposed of 73,304 misdemeanors and 205,736 quasi-crimes. In the City of New York about 20,000 felony prosecutions are initiated annually of which 12,000 "die" in the Magistrates' Court.

A few murder cases claim enormous attention, although murder is a relatively unusual crime. In New York State,

* "Law in Books and Law in Action," 44 *Amer. L. Rev.* 12 (1910).

prosecutions for murder constitute only one-half of one per cent of the felony cases prosecuted. The death penalty is discussed widely but in 1925 in New York, the death penalty constituted only one-fourth of one per cent of felony punishments. There were in England and Wales in 1925, 59,903 persons charged with indictable offenses, and while exact comparisons are dangerous because of varying practices in bringing arrested persons to trial, it is quite within the facts to say that the total of similar prosecutions in New York City, Philadelphia, Chicago and Detroit during the same year was quite considerably in excess of that number.

A demand for "reform" in the administration of justice has acquired a considerable momentum of late, and recent legislative sessions have ground out many laws amending criminal procedure. Sheer conjecture guided much of this legislative action. Little study was made as to the need for the laws enacted or the probable effect of them. Research into the fundamental conditions under which the administration of justice operates guides only a bare handful of states. Consequently, legislation now hailed with enthusiasm may not appreciably affect the recognized shortcomings of criminal law administration at all.

While there are serious limits to the extent to which exact methods can be used in the investigations of criminal law administration, a fairly obvious test which can be used is a statistical determination of what dispositions are made of the cases handled by the courts with conveniently determinable correlations of significant factors.

Such studies can reveal not only the importance and results of our diversified rules of procedure but the varying methods followed in administering these rules. It is probable that with an adequate amount of record data concerning the disposition of cases over a period of time, much that is significant concerning the operation of rules of procedure can be determined. Moreover, such a method can measurably indicate in advance what may be expected of some current proposals for reform. Few of such proposals are actually new. In the variegated procedures, past and present, of the American states nearly every device has been tried and has left somewhere in the records the material for its investigation.

The data necessary for such interpretation are very difficult to collect and to weld into usable form. Such scanty reports as we have from a number of police departments, a few attorney-generals and a few other officials, are almost useless for comparative purposes. Records are likewise inadequate. A vast amount of criminal law administration is conducted without records. Much of the remainder is hidden in antiquated and inaccessible dockets, in irregularly filed court papers, and in the generally unintelligible and sometimes dishonest records of city police departments.

A few somewhat intensive studies of these records in single cities and states have been made during the past six years, and through the published results of these studies, there are now available some factual data concerning the disposition of criminal cases in several fairly typical major cities, a considerable number of smaller cities and a few

rural areas. The most comprehensive of such studies of criminal cases have been published by the Crime Commission of New York State.* In these studies there were collected, tabulated and interpreted the essential procedural facts in 37,165 felony cases in various selected jurisdictions in 1925 and in the second half of 1926. Another study of the same sort is contained in the Missouri Crime Survey.† This survey covered 10,516 felony cases originating in thirty-nine counties of the state widely distributed as to geographical location and as to the character and density of the population. In the three most completely urban counties (St. Louis City, Jackson and Buchanan Counties) the survey took all cases (excepting liquor law violations) originating in the circuit courts from October 1, 1923, to the same day in 1924. In the remaining less densely populated counties the cases in the two years following October 1, 1922, were used. The total number of cases considered in the 36 smaller counties was about equal to that of the three urban counties. A third study was conducted in 1924 by the combined efforts of the American Institute of Criminal Law and Criminology and the Department of Public Welfare of the State of Georgia. Their collection of case data included cases ori-

* *A Statistical Analysis of the Criminal Cases in the Courts of the State of New York for the Year 1925,* by C. E. Gehlke and Raymond Moley. For the cases covering the last half of the year 1926, see the *Report of the Sub-Commission on Statistics for 1928,* by Harry Willbach and Raymond Moley, Ed. These reports constitute a comprehensive interpretation of the statistics gathered by the Commission. Both are published by the Crime Commission of New York State, Albany.

† *The Missouri Crime Survey* (New York, 1926), Raymond Moley, Editor. The statistical interpretation of criminal law administration in this study was written by C. E. Gehlke.

ginating in five Georgia counties in 1916 and 1921. Twelve thousand and sixty-two cases were briefed and tabulated, of which 3,508 were felonies and 8,554 were misdemeanors.*

In 1921 the Cleveland Foundation conducted a study of approximately 4,000 felony cases originating in the city of Cleveland in 1919-21.† Following the publication of this study a private agency called the Cleveland Association for Criminal Justice was established which has maintained for six years a card index of all felony cases in the courts of that city. The published bulletins of this organization contain detailed tabulations of the dispositions of these cases. A similar organization, the Baltimore Criminal Justice Commission, has gathered such records of selected felony cases since 1923. The Chicago Crime Commission has collected and tabulated a vast amount of case data since its establishment in 1919. In 1927-28, the Illinois Association for Criminal Justice conducted a survey similar to that of Missouri, using the cases originating in 1926 as a basis. Sixteen thousand, eight hundred and twelve cases were briefed and tabulated. Cases from selected counties were included and in order to provide material for comparative purposes, Milwaukee, Wisconsin, was included.‡ Finally, there has been made a study of

* The counties were Bibb, Lownes, Tift, Randolph, and Fulton. The latter is the county containing the city of Atlanta. This study was published as "Crime and the Georgia Courts" in the *Journal of the American Institute of Criminal Law and Criminology*, Vol. XVI, p. 168. It was also published as a monograph under the same name. The study was largely conducted by Mr. Hugh Fuller.

† *Criminal Justice in Cleveland* (1922), Roscoe Pound and Felix Frankfurter, Editors and Directors. The statistical work was done by C. E. Gehlke.

‡ The Illinois survey has not been published in book form although sec-

felony cases in Cincinnati.* The materials gathered by these organizations provide for the study of criminal law administration precise factual data in statistical form concerning no less than one hundred thousand cases. They are drawn from several states with sufficiently diversified jurisdictions to offer comparisons.†

It is unnecessary to review here the many conclusions which have resulted from the statistical studies which are mentioned in the foregoing paragraphs.‡ The purpose of this book is the study of the American prosecutor's office as it operates under the political influences to which it is exposed. Therefore, it is sufficient here to review only those statistical results which throw light upon this subject.

The various analyses of criminal law administration by means of case "mortality" statistics have thrown new light upon the importance of the prosecutor. Viewed in this perspective, his relative significance is great. Two good illustrations of this fact are contained in the detailed figures of dispositions of felony cases in New York and

tions of it have been released to the newspapers. The material which we cite hereinafter is taken from these releases.

* Published by the Cincinnati Bureau of Municipal Research.

† Useful data are published also by a number of state agencies, particularly, The Massachusetts Department of Correction, The New York Department of Correction, a few municipal and magistrates' courts, the attorney generals' offices of California and Minnesota, and the Comptroller of the State of Connecticut.

‡ Summary statements may be found in the 1927 *Report of the Crime Commission of New York State,* pp. 99-104; Moley, *An Outline of the Cleveland Crime Survey* (Cleveland), 1922; Moley, *The Administration of Criminal Justice in Missouri. A Summary* (St. Louis), 1926; A general comparative review is, Moley, "Some Tendencies in Criminal Law Administration," *Political Science Quarterly,* Vol. XLII, pp. 497-523.

Chicago.* It will be convenient to consider the disposition of cases under the three main steps in the administration of criminal justice: the preliminary hearing, the grand jury, and the trial court. In each of these, there will be indicated the exact methods of disposition and the percentage of cases which are dropped at each point.

Disposition of Felony Cases in Preliminary Hearing

	N. Y. City 1925	Chicago 1926
Total Cases Entering Preliminary Hearing:		
Number	19084	10829
Per cent	100.	100.
Discharged	40.59	19.55
Charge Reduced to Misdemeanor	16.19	.14
Dismissed, Want of Prosecution	.43	23.10
Nolle Prosequi	....	7.08
Miscellaneous Dispositions	.84	6.68
Total Eliminated in Preliminary Hearing	58.05	56.55

An analysis of this table reveals the fact that almost exactly the same proportion of cases are eliminated in the preliminary hearing in the two cities. It is noteworthy, however, that in New York a great number of cases are "reduced to misdemeanor." In Chicago, the procedure seems to permit the carrying of such cases through the process of indictment up to the time when pleas are re-

*I am using in this comparison details contained in the *Report of the New York State Crime Commission for 1927*, and in the *Preliminary Report of the Illinois Association for Criminal Justice* by C. E. Gehlke. The figures for 1925 for New York State are used, because that was the only year completely analyzed by the Crime Commission. Their analysis of the cases in half of the year of 1926 indicates, however, that there was no substantial difference in the methods of disposition of cases in the two years. Therefore, the comparison of New York for 1925 with Chicago for 1926 is valid.

quired and at that point a great many cases are reduced to misdemeanors and punished as such. When this allowance is made, it is clear that the actual "mortality" of cases in preliminary hearing in Chicago is larger than in New York, although the proportion in New York is very high among the cities. Of the remaining cases which are eliminated in preliminary hearing in New York an overwhelming proportion are simply "discharged," but in Chicago they are "discharged," "dismissed, want of prosecution" and "nolle prosequi." While it appears that the difference is rather marked between the two cities, in practice the various methods of disposition are much the same. It is possible that, due to the homogeneous political complexion of New York, there is less disposition on the part of the judges of the preliminary hearing and the prosecutor to place responsibility on each other in the dismissing of cases. In either city, however, the main fact is that the prosecution places almost all the responsibility upon the police officer for the preparation of the case and is in most cases apparently utterly indifferent as to whether the case is bound over or not. Active prosecution at this stage might contribute a great deal to the effectiveness of police in certain cases, but under the system as it now operates the police receive practically no assistance at all from the prosecutor assigned to the courts for preliminary hearing. The influence of the prosecutor, therefore, in the preliminary hearing, while potentially important is actually negative, and because it is negative there probably results the dropping of a great many cases which ought to be continued.

Disposition of Felony Cases in Grand Jury

	N. Y. City 1925	Chicago 1926
Total Cases Entering Grand Jury:		
Number	8005	4705
Per cent	100.	100.
No True Bill	28.27	28.56
Miscellaneous Dispositions	1.50	1.97
Total Eliminated in Grand Jury	29.77	30.53

Again the two cities are similar in the proportion of cases eliminated in the grand jury. On account of the great influence of the prosecutor in the grand jury, we may in actual fact ascribe the responsibility for dismissing these cases to him almost entirely. It ought to be explained that the New York and Chicago figures at this point differ in that the Chicago figures include more than seventeen hundred cases which are taken directly to the grand jury by the state's attorney, while in New York such cases are not included in the tabulation.

Disposition of Cases After Indictment

	N. Y. City 1925	Chicago 1926
Cases Indicted:		
Number	5622	4982
Per cent	100.	100.
Acquitted by Jury	8.98	5.42
Dismissed on Motion	14.52	....
Nolle Prosequi	....	5.82
Stricken with Leave to Reinstate	....	7.51
Stricken account of Other Indictments	....	13.85
Dismissed, Want of Prosecution	....	4.12
Felony Waived, Tried by Court, Acquitted	....	5.45
Pending	4.32	4.38
Miscellaneous Dispositions	.96	4.29
Total Eliminated	28.78	50.84

Various surface differences are to be noted in this table between disposition of cases in the two cities. They are, however, more apparent than real. For example, New York State does not have the nolle prosequi;* it having been abolished, consequently the number of cases dismissed on motion in New York includes cases which are disposed of in Chicago in other ways. It is noteworthy that the New York procedure permits a much greater simplicity in methods of disposition of cases. The net result of eliminations at this stage of the criminal process is that half of the cases disappear after indictment in Chicago, while less than a third are eliminated in New York. An important fact to remember is that the cases which survive the process of elimination in the trial court may actually be reduced to a misdemeanor by a plea of guilty. This we shall consider in a subsequent chapter, where it is indicated that a great proportion of the cases which are not eliminated are reduced to the grade of misdemeanors and punished as such.

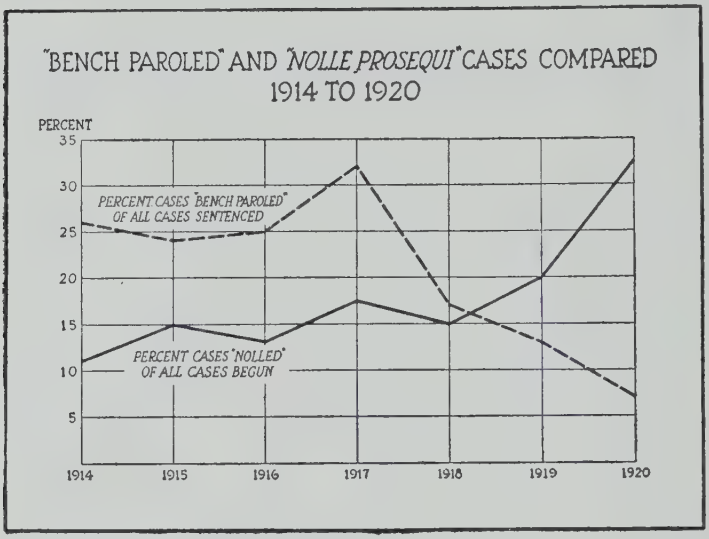
If the foregoing tabulations are considered in connection with the administrative and legal powers of the prosecuting officer, it will appear immediately that the part which the prosecuting officer takes in the administration of criminal justice is continuously important in practically every stage of procedure. The life or death of a criminal case rests with him.

Statistical studies, such as we are considering, have brought out with great definiteness the infinite variation in practice which is possible in the enforcement of the

* See p. 153.

same law. This gives a new meaning to the well known fact that we are dependent upon a government of men rather than of laws. The processes of administration, which, after all, are simply public officials' ways of doing the day's work, are of paramount importance in criminal law enforcement. In the enforcement of liquor laws, the Missouri Survey found that the cities, particularly Kansas City and St. Louis, had substantially refused to prosecute such offenses as felonies. The percentage of executed sentences in relation to warrants issued in liquor cases was 1.94 in St. Louis, .33 in Kansas City, 14.29 in semi-urban Buchanan County, and 25.75 in the rural counties of the state. This is rather good evidence that in spite of the doubts which we may entertain about criminal procedure in America, we are assured that it has a happy faculty of shaping itself to the likeness of the local community. Another striking difference between rural and urban conditions we have already shown in the relative proportion of cases dismissed in preliminary hearings. In a subsequent chapter we indicate that while two-thirds of convictions in Los Angeles are by plea of guilty, two-thirds of the convictions in San Francisco are by verdict of a jury. A strong prosecutor's office in Rochester accepts compromise pleas (lesser offenses) in only two per cent of its cases, and a weak office in Kings County in fifty-seven. Vast differences in sentencing are to be noted among judges in the same state. Sentences for manslaughter average ten years in New York City and five in the other cities of the state. Sentences for robbery in the first degree in New York City average 19.8 years, and are only 11.3 in the smaller

cities. The Cleveland Survey demonstrated statistically the remarkable variation of policies among the judges in the same court. Still more striking variations are found in the same court over a period of years. Criminal lawyers will find one avenue of escape for their clients more favor-



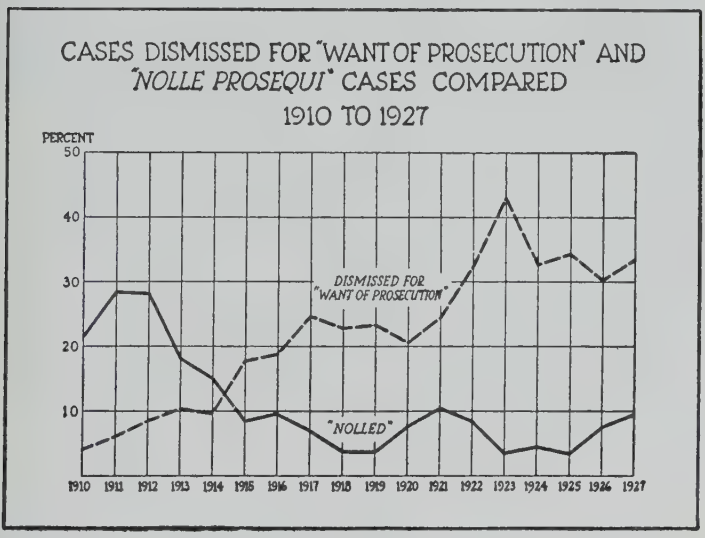
GRAPH 1

Comparison of decline of "bench paroles" with increase of "nolle prosequis" in Cleveland.

able in one year and another in the following one. The Cleveland Survey shows this in a striking manner in a chart which, with some modification in form, we show in Graph 1.

This indicates a comparison of percentages of "bench paroles" and "nolle prosequis," over a period of years.

It shows that after 1917 the judges, who were then subjected to serious criticism in the public press for leniency, became much more strict in granting bench paroles. As soon as this happened, the pressure of criminal lawyers was applied to the prosecutor's office with the result that



GRAPH 2

Comparison of decline of "nolle prosequis" with increase of "dismissed for want of prosecution" in the Municipal Court of Chicago.

a great increase in nolle prosequis took place. We have made a comparison of two kinds of dispositions of felony cases in the Municipal Court of Chicago for a period of several years. It indicates that, after the prosecuting office refused freely to exercise the nolle prosequi, the same end was accomplished by another procedural device, "dis-

missed for want of prosecution." Graph 2 indicates the result.

The statistical method which we have briefly illustrated in this chapter has served a useful purpose in the study of courts, prosecution and law enforcement generally. It has enabled us to see law administration in perspective. It eliminates the dangers of drawing conclusions, as does the public, from unusual cases. It has given some conception of the magnitude of the problem of criminal justice. It has, moreover, suggested the general theme of this book by throwing into strong relief two indisputable facts. The first of these is the strikingly large proportion of criminal cases which reach some disposition other than trial by jury. Such dispositions are both by force of circumstances and by sanction of law made by the prosecutor. The prosecutor appears as the dictator of the criminal process. The second fact conditions the first. Comparative statistical studies portray the tremendous influence of forces which lie outside of the law or its administration. This appears in such variations in practice as the foregoing paragraphs have shown to be possible under the same law. The prosecutor's vastly important exercise of discretion can be understood only in connection with the forces of a political, social and economic nature which condition his activity.

Administrative methods are not always clear-cut objective things that can be easily subjected to a nice scientific analysis. They are deeply involved in considerations which go to the motives of human conduct, which involve political relationships, economic forces, factors in public

opinion, and a great many well-nigh imponderable and immeasurable considerations. To attempt a description of American criminal law administration without a consideration of these questions is to formulate a very imperfect picture. On the other hand, to include them is to venture at times far into the realm of personal interpretation with only an occasional group of facts which bears the appearance of scientific method. This is due in part to the lack of such scientific method, and in part to the impossibility of applying scientific methods to certain factors with which we must concern ourselves. Conclusions, therefore, must be tentative, personal, and we hope, subject to revision.

CHAPTER III

THE AMERICAN PROSECUTOR

THE great and constantly increasing significance of the American prosecuting attorney has been strangely neglected by institutional commentators and historians. His influence is confined geographically to a local unit of government, but within this area it is quite clear that the potentialities of the office are limited by scarcely anything except the skill, the intelligence, and the legal and political capacity of the incumbent. Much of this significance is due to the political implications in the powers conferred upon him by law. These specified statutory powers constitute an imposing array. In Illinois, for example, he is required by statute "to commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in any court of record in this county, in which the People of the State or county may be concerned . . . to prosecute all forfeited bonds and recognizances, and all actions and proceedings for the recovery of debts, revenues, moneys, fines, penalties and forfeitures accruing to the State or his county . . . to commence and prosecute all actions brought by any county officer in his official capacity . . . to defend all actions and proceedings brought against his county or

against any county or State officer within his county . . . to attend the examination of persons brought before any judge on habeas corpus . . . to attend before justices of the peace and prosecute charges of felony, or misdemeanor (triable by a court of record) . . . to give his opinion . . . to any county officer and to justices of the peace . . . upon any question of law . . . to assist the attorney general whenever it shall be necessary . . . to appear in all proceedings by collectors of taxes against delinquent tax payers for judgments to sell real estate." * This formidable list of duties is to be found in those states in which the prosecutor has numerous civil as well as criminal duties. It indicates clearly that in the prosecution of criminal cases the interests of the state are, in the words of Goodnow, "almost entirely in the hands of that officer."†

* Callaghan's Illinois Statutes Annotated, Ch. 14, Sec. 5: Duties of State's attorney.

See also the Consolidated Laws of New York, Ch. 11, Article 11, Secs. 200-205; also for Missouri, Revised Statues 1919, Secs. 735-738; for California, Pol. Code, Secs. 4153-4156b; and for Texas, Revised Civil Stats. (1925), Title 15, Arts. 333-339.

Among other duties is specified the duty to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed. People v. Neff (1907), 121 App. Div. 44, 106 N. Y. S. 1140, affirmed (1908) 191 N. Y. 286, 84 N. E. 63, after pointing out that since the enactment of the County Law, there does not seem to be any statute defining his general duties, says as to this: "The district attorney is the official, from time immemorial, charged with the prosecution 'for crimes and offenses cognizable' by the courts held in the county where he serves. He is an official designated in the constitution, and without any statute defining his duties the prosecution of those under indictment and tried in his county whether pursuant to order of the court or by virtue of original jurisdiction is within the scope of his duties" (p. 46).

† Frank S. Goodnow, *Principles of the Administrative Law of the United States* (New York, 1905), p. 414. For a discussion of the question of whether participation of other counsel than the public prosecutor in a prosecution for crime is permissible, see ibid., p. 414.

Probably the most successful way of describing the powers of the prosecutor is to present them in their relation to each step in the criminal process. At the very beginning of a criminal prosecution he may, in some states, bring the efforts of the arresting officer to an end by refusing to issue a warrant. This is true in Missouri, where he practically determines on his own responsibility when a prosecution shall be initiated by the issuance of a warrant. It is easy to see how completely the exercise of the power to refuse warrants controls the activity of the police, and when freely exercised how completely it may discourage police activity.

In most states the prosecutor may participate actively in the preliminary hearings and in coroners' inquests. His power in the examining magistrate's court is very significant because, if the magistrate refuses to hold the accused, he may take the case directly to the grand jury. If, on the other hand, he refuses to participate actively in the hearing before the magistrate, the case is likely to be lost. In the city of Chicago in 1926 a total of 23.1 per cent of all cases entering the preliminary hearing were "dismissed for want of prosecution." This disposition is directly chargeable to the action or inaction of the prosecuting officer.

It is well known that except in unusual instances the grand jury is a rubber stamp for the prosecuting attorney. The common parlance of a prosecutor's office is not "presenting a case to the grand jury," but "getting an indictment," or "indicting someone." Anyone who has experienced service on a grand jury knows how inevitably this

domination comes about. The order of cases considered is usually subject to the prosecutor's determination. Almost always he is the only lawyer in the room and the laymen present are stricken with the reverential silence usually accorded supposed learning and experience. The prosecutor conducts the examination of the witnesses and asks 90 per cent of the questions. He draws the indictment himself and submits it for the uncritical and unquestioning approval of the foreman. Finally, in the states where an information may be filed instead of an indictment, the responsibility for initiating a felony prosecution rests upon the prosecutor alone.*

After the indictment or information is filed, he interviews witnesses, examines evidence and assists in many instances in the interrogation of the accused prior to arraignment. At this stage of prosecution his influence reaches its maximum because of his interest in the character of the plea that is to be offered. As will be shown presently, his tendency to bargain with the defense concerning the plea becomes one of the most significant features of criminal law enforcement. If a trial follows the plea, he represents the state, and with the judge's strict limitation of power in American state courts, the prosecutor is about the only protection the people have against the forces arrayed on the side of the defense. In a large city office the assignment of assistant prosecutors is very important. A skillful manager may win many cases even with an inadequate staff. On the other hand, the chief may, by design or mischance, assign incompet-

*For a list of these states see p. 134, n.

ents to cases which he is not over-anxious to win, and "ride the horse to lose." In the course of the trial his participation extends even to matters over which the judge seems to have sole and exclusive jurisdiction. In the preparation of instructions to the jury, for example, the judge in many instances depends upon the prosecuting attorney. A questionnaire addressed to the prosecutors of the state of Missouri revealed that most of the instructions were prepared for the judges by the prosecuting attorneys, especially in important cases.

The prosecutor's power extends even beyond the verdict. He is frequently consulted by the judge in fixing sentence, in suspending sentence and in granting probation. Later still the authorities usually consult him in granting pardons and paroles to prisoners whom he prosecuted.

In rural districts the decay of the offices of sheriff, coroner, and constable has compelled the prosecuting attorney to do police work, such as the investigation of crimes, the gathering of evidence, and, frequently, the making of arrests. The multitudinous activities of the district attorney in Dreiser's *American Tragedy* is a somewhat extravagant but suggestive picture of the extent to which an ambitious prosecuting officer may participate in law enforcement.

In a report recently published by the Illinois Association for Criminal Justice, a former state's attorney of Cook County, John J. Healey, estimates that for conditions in the field of law enforcement in the City of Chicago the state's attorney is 70 per cent responsible, the

police 20 per cent and the judges 10 per cent. In the Missouri Survey a table appears which shows the relative importance of the prosecutor, judge and other authorities in disposing of cases. It indicates that of the cases in St. Louis which were eliminated, fifty per cent were "eliminated by the prosecutor," twelve by the judge and thirty-eight by all other agencies, including the jury.

The wide discretionary powers thus exercised by the American prosecuting attorney are not usurped. They are well grounded in American and English law. As stated by the Illinois Supreme Court:* "Such an officer is acting in a quasi-judicial capacity, representing public justice, and should stand indifferent as between the accused and any private interest." He is, according to the Pennsylvania Supreme Court,† "a quasi-judicial officer. He represents the Commonwealth, and the Commonwealth demands no victims. It seeks justice only,—equal and impartial justice,—and it is as much the duty of the District Attorney to see that no innocent man suffers as it is to see that no guilty man escapes." The Supreme Court of Michigan likewise defines his responsibility:‡

"The Prosecuting Attorney is a very responsible officer, selected by the people and vested with personal discretion, trusted to him as a minister of justice, and not as a mere legal attorney. He is disqualified from becoming in any way entangled with private interests or grievances in any way connected with charges of crime. He is expected to be impartial in abstaining from prose-

* People v. Hartenbower, 283 Ill. 591 (1918). See also People v. Gerold, 265 Ill. 448, p. 478 (1914); People v. Munson, 319 Ill. 596, p. 599 (1926).
† Com. v. Nicely, 130 Pa. 261 (1889).
‡ Engle v. Chipman, 51 Michigan, 524 (1883).

cuting, as well as in prosecuting, and to guard the real interests of public justice in favor of all concerned. This discretion is official and personal."

Upon grounds of public policy * the prosecuting attorney enjoys an immunity from civil liability for his official acts similar to that of judges and grand juries. This extends even to acts which he performs maliciously and without probable cause.†

A noteworthy study of the prosecuting attorney in action could be made from an examination of the criminal appeals of almost any of the states. Here in the allegations of the defeated defense counsel is set forth as illuminating an account of legal malpractice as has ever been pictured. It is true that from such a source one is not likely to find the shades of meaning and the surrounding circumstances which temper the severity of the picture. But when every factor favorable to the prosecuting attorney is considered, the record is a sorry one. Every state has its share of examples of sharp practices, of disobedience to the court, neglect of duty, threatening, extravagant, and abusive language, the use of forged testimony, almost unbelievable ignorance of the law, and

* Yaselli v. Goff, 12 Fed. (2d) 396 (1926), affirming 8 Fed. (2d) 161 (1925) and reviewing the authorities.

† "The immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions." Yaselli v. Goff, supra at p. 406. See to the same effect: Watts v. Gerking, 111 Ore. 654 (1924), 228 Pac. 135, 34 A. L. R. 1489; Griffith v. Slinkard, 146 Ind. 117 (1896), 44 N. E. 1001; Smith v. Parman, 101 Kan. 115 (1917), 165 Pac. 663; Ostman v. Burere, 141 Mo. App. 240 (1910), 124 S. W. 1059.

of demagogic appeals to the mob spirit. "Prosecuting attorneys do not hesitate," says Dean Roscoe Pound, "to conduct the most searching, rigid, and often brutal examinations of accused or suspected persons with all the appearance of legality and of having the power of the state behind them."* To explain this by saying that the activities of defense counsel are even worse is not to excuse it, nor can it be softened by saying that the appellate decisions do not deal with the temperate manners, the legitimate zeal for public order, the depth of legal knowledge and the scrupulous regard for fairness that mark the actions of the better prosecutors. The state has a right to expect and should have the means to require that its own counsel will rise higher than the average counsel for the defense.†

* "Law in Books and Law in Action," 44 *Am. Law Rev.* 12.

‡ See:

State v. Russel, 83 Wis. 330 (1892), 53 N. W. 441—ruse to get testimony.

State v. Poston, 199 Iowa 1023 (1925), 203 N. W. 257—violating rules of evidence to get extraneous matters before the jury.

Venable v. State, 84 Tex. Cr. App. 354 (1918), 207 S. W. 520—use of threats and coercion.

People v. Creasy, 236 N. Y. 205 (1923), 140 N. E. 563—use of forged testimony.

State v. Harness, 10 Idaho 18 (1904), 76 Pac. 788—appeal to mob violence: "any man is justified in taking the law in his own hands under such circumstances."

Hemphill v. State, 72 Tex. Cr. R. 638 (1913), 165 S. W. 462—appeal to mob violence.

State v. Hess, 240 Mo. 147 (1912), 144 S. W. 489—declaring belief of guilt.

State v. Eberhart, 116 Minn. 313 (1911), 133 N. W. 857—general incompetency and neglect of duty.

State v. Fischer, 124 Mo. 460 (1894), 27 S. W. 1109—abusive language regarding the defendant.

Further examples are collected in 4 Boston U. L. R. 139 (1924); 24 Mich. L. R. 834 (1926).

During the Sacco-Vanzetti controversy *The Nation* published an interesting symposium of opinion as to whether a prosecutor is violating the canons of legal ethics in presenting evidence that tends to show guilt while failing to call witnesses whose testimony contradicts what he is trying to prove. A number of prominent members of the bar experienced in criminal practice participated in the discussion. One of them pointed to a rule of professional ethics adopted by the American Bar Association in 1908 which stated that:

> "The primary duty of a lawyer engaged in public prosecution is not to convict but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible."

Mr. Max Steuer, a member of the New York bar, said that the calling of such witnesses constitutes an implied avowal of their credibility and therefore the prosecuting attorney, if he believes that these witnesses are not to be trusted, has no obligation to call them. "Convictions would be rendered impossible in any case, however clear, if the district attorney was compelled to discredit his own case by calling contradictory witnesses. . . . If the prosecuting attorney becomes apprised of a witness who could give testimony favorable to a defendant, it is his duty to notify the defendant's counsel of the fact—furnishing to the defendant's counsel the name of the witness and his whereabouts—and to afford him every opportunity of access to the witness."

Another commentator, George Gordon Battle, stated

what seems to be nearer to the most enlightened opinion concerning the ethics of the case: "There is a difference between the function of the public prosecutor and the private counsel. It is the bounden duty of the public prosecutor, representing the people, to bring out all the facts to the end that justice may be done . . . The principle, however, must be interpreted by the district attorney. He is under no obligation to call to the stand witnesses who he has reasonable grounds to believe are mistaken or perjured in their testimony. He is not bound to call witnesses whose testimony would merely obscure the issue and confuse the jury. But it is undoubtedly his duty to call all reliable witnesses who can give legal evidence material to the issue of the guilt or innocence of the defendant."

As will be shown in much more detail in a subsequent chapter, prosecution in England until recent times was entirely a private responsibility. Public prosecution developed more rapidly in the United States, and at an earlier date than in England. This was probably due to the fact that while the colonies adopted the English attorney general, they found that, for purposes of convenience, it was better to create a local officer vested with the duty of conducting criminal prosecutions. Goodnow ventures the suggestion that "an investigation of the development of this office will show that it is the result of an attempt to disintegrate the office of the attorney-general." * He is of the opinion that the first step in the

* *Principles of the Administrative Law of the United States* (N. Y., 1905), p. 412.

development of the local prosecutor's office was a provision for an assistant or deputy attorney general and that later this officer came to be elected by the people of the district over which he had jurisdiction.*

By 1704 the office of public prosecutor in Connecticut was established, it being required, by statute, to assist the attorney general of the colony. This dependence upon a public prosecutor came to be a standard form of governmental organization in the United States at a very early time, far earlier, as we shall see, than the creation of public prosecuting officers in England.† At the present time more than half of the states provide in their constitution for local officers to act as public prosecutors, and in several more states such an office is provided by statute. The names applied to the office vary. There are prosecuting attorneys, county attorneys, state's attorneys, solicitors, district attorneys, circuit attorneys and others. The term is from two to six years. The usual method of choice is by election, but in Connecticut the prosecutor is judicially appointed, and in New Jersey appointments are made by the governor. In addition to his duties in connection with the criminal law, he is often required to serve as legal adviser for county and local officers and he represents the county in bringing or defending civil suits in which the county is a party. In his capacity as prosecuting officer he is clearly the agent of the state.

The attorneys general of the various states are, for the most part, civil officers interested in the civil side of

* Ibid., p. 413.

† See Herman G. James, *Local Government in the United States* (New York, 1921), pp. 144-151.

judicial administration. Many of them, however, have important functions in connection with the enforcement of the criminal law. They appear for the state in certain types of prosecutions and have the power in a number of cases to enter a nolle prosequi. Their power over local prosecuting attorneys is usually limited to a general grant of supervisory power. For example, the statutes of Louisiana require the attorney general to "exercise supervision over the several district attorneys." In a few states, notably Missouri, it is the duty of the attorney general to represent the State in all criminal appeals. Occasionally provision is made in the statutes for the appointment, either by the attorney general or by the courts, of special prosecutors for the conduct of particular cases.* In Oregon the governor may employ state officers to enforce the prohibition law, but in North Dakota such a law was held unconstitutional, on the ground that such powers are reserved to officers elected by local vote. In several states the attorney general may appear and aid locally elected prosecuting officers. Pennsylvania provides an interesting survival of the English custom of private prosecution. The statute in that state provides that if the district attorney shall neglect or refuse to prosecute a criminal charge regularly returned to him, or in case the district attorney shall differ from the counsel of a private person who has been directed to assist in the prosecution, the court on the petition of the private prosecutor may direct the private counsel to conduct the entire proceedings.

* But such a power will be employed only in exceptional cases. See Commonwealth v. McHale, 97 Pa. 397 (1881); State v. Jepson, 76 Kans. 644 (1907).

In certain other states it is possible for the governor to supplant local prosecuting attorneys in the prosecution of given cases and to vest such prosecution in the attorney general. A very interesting recent example of this occurred in New York in the prosecution of the former Secretary of State, Florence Knapp, who was charged by private persons with criminal acts in connection with the expenditure of state funds. Governor Smith caused the charges to be placed before the district attorney of Albany County. The latter refused to act and the Governor issued an order superseding him and appointing the attorney general to take charge. It was then the duty of the attorney general to consider whether the matter should be presented to the grand jury. There was provision within the law for the creation of a special grand jury for the purpose.

¶

In considering the organization of the prosecuting attorney's office from the standpoint of its chief job, namely, the preparation of cases for trial, we recognize at once two distinct types of technique. There is required the technique of the lawyer in the determination of the legal aspects of the case, the sifting of evidence, the planning of the case, the presentation of the case in court, the proper examination of witnesses, and the preparation of instructions for the use of the judge when he wishes them prepared. In addition there is an equally important special skill, that of the expert criminal investigator.

In the smaller counties little differentiation between

these techniques is recognized. The elected county prosecutor is pretty much of an all-round man. The assistance he gets from the sheriff and the coroner is unimportant and he must serve as lawyer, detective, scribe, and at times as pathologist and psychiatrist. In a few of the larger counties, a good deal of specialization is recognized. There are on the payroll of the largest prosecuting office in the United States, that of the state's attorney of Cook County, several hundred persons including scores of detectives assigned to it from the Chicago police department.* This permits a very considerable specialization not only in legal work but in the other tasks of the office. When, as is frequently the case, the prosecuting office is charged with representing the state in preliminary hearings and in coroner's inquests, there are special (usually small-salaried) assistants assigned to such work. In a state like Missouri, where warrants are issued by the prosecuting office, the very important discretionary power thus exercised is cared for in the large cities by specially trusted deputies. There are always lawyers with rather superior experience entrusted with commercial cases. There are others, who, in the words of a chief deputy in one of the large cities of the United States, "are rough and ready men, without much legal knowledge, who try the crude stuff like robbery and burglary cases." † The laws of New York permit the inclusion of an expert

* It does include, however, a considerable number of lawyers and clerks who are engaged in civil business.

† There is no implication here that such cases were tried with less scrupulous regard to the ends of justice. He meant that such cases required little knowledge of the law.

pathologist in the staff of the New York County district attorney's office, who supplements the efforts of the City Medical Examiner in certain murder cases. Some offices, notably in Cook County, maintain a bail bond bureau for the investigation of the character and resources of sureties. The Los Angeles district attorney's office is highly departmentalized. There are "Homicide," "Complaint," "Preliminary," "Grand Jury," "Parole Board," "Red Light Abatement," "Long Beach," "Juvenile Failure to Provide," "Legal Advisory," "Clerical," and "Detective" departments, while two or more trial lawyers are assigned to each of the five trial courts.* The office includes lawyer specialists on insanity, germs, toxicology and bacteriology.

From the standpoint of organization the most interesting of the large prosecuting offices in the United States is that of New York County.† It is famous even in story and in drama. Great political reputations have been made in it and brilliant political careers have started there. It is not, however, on the sensational character of the work of this office that the safety of lives and property in New York City depends, but upon its detailed organization and the effectiveness of the work which is performed there. In organization and equipment, it is probably the most efficient prosecuting machine in the United States. The

* Based upon information as of June, 1927.

† It should be noted here and also in connection with certain statistical data presented later that there are in New York City five counties: New York, Kings, Queens, Bronx, and Richmond. The office that we are describing here is that of New York County, which includes what is generally known as Manhattan Island. This county no longer has the largest population in the city of New York. Kings County now has that distinction. Each of the counties has a district attorney but there is but one police department for the entire city.

great pressure of work in such an office or in any sizeable prosecuting office is not the trial of cases regularly initiated by the police. The greatest burden is the investigation of the vast number of complaints that come to prosecutors. The staff of the office handles 100,000 complaints a year. The telephone bureau receives more than 250 incoming calls each business hour of the day. The office itself occupies a nine story building. There are 221 persons on the pay roll. The office, of course, is highly departmentalized and some notion of the scope of its activities can be gained by a list of its departments. There is the Department of Magistrates' Court Assistants, which directs the prosecution in the preliminary hearings throughout the city. There is a Complaint Bureau, with the following sub-divisions: Complaints of Abandonment by Fathers of their Children; Complaints against Stock Brokers and those who sell Spurious Securities; Complaints against those who perpetrate frauds upon Merchants, Insurance Companies, and Bankers; Complaints against Quack Doctors. There is an Indictment Bureau, which has charge of cases that are to be passed upon by the grand jury and which drafts the actual forms of indictments. There is the Homicide Division of the office, which, according to District Attorney Joab Banton, "never sleeps—an assistant and a stenographer are on duty every minute of the day and night. If a murder is committed in New York County at any time, the police notify the stenographer who notifies the assistant district attorney and both assistant and stenographer proceed to the scene of the crime and take the stories of witnesses."

There is a Trial Division under the immediate supervision of the chief of the staff of the district attorney's office. This division falls into two groups, the Trial of cases in the Court of General Sessions, and the Trial of cases in the Court of Special Sessions. There is a Bail Department of the office which investigates the character of security offered as bail for defendants. It also keeps track of forfeitures of bail and supervises the collection of the forfeited bonds. There is a Clerical Department and a Stenographic Division and a Process Servers' Department. There is a Chief Clerk in charge of the entire administrative personnel of the office. There is a law library of 42,000 volumes. There is an Appeals Bureau in which members of the professional staff are engaged in the trial of cases in the various appellate courts. There is the Photographic and Photostatic Studio and in addition an engineer and a draughtsman. There is a medical examiner attached to the office whose work constitutes an important division of its activity.

A very significant aspect of Mr. Banton's administration of the New York district attorney's office is the manner in which he directs the administrative activities of the Court of General Sessions, which is the main trial court of the county. Due to his control over the calendar, which is given to him by law, he is, in fact, an assignment commissioner. He directs the flow of cases in the nine divisions of the court much in the manner of a "judicial superintendent."

In some of the states it is provided by law that the prosecuting attorneys be paid salaries, usually varying

with the population of the county. More frequently the attorney is paid, either in whole or in part, by fees. In some of these instances the income of the prosecuting attorney depends upon the number of convictions secured or, worse still, upon the number of indictments returned.

The fee system seems, to the legislative mind, to offer the most flexible means of paying for a service the amount of which is bound to be very irregular from year to year. It works most imperfectly, however, even at its best, and in some instances its operation is absurd. In Indiana, for example, a salary of five hundred dollars per year may be augmented by fees. These fees are, in part, as follows: in misdemeanor cases when a conviction is secured, seven dollars; in felony cases when a plea of guilty is offered, seven dollars; and, when there is a trial followed by conviction, ten dollars. Thus the labor of preparing a case, even a murder case, and the presentation of such a case in court, provides a compensation only three dollars more than a case in which a plea of guilty is secured. It is not surprising that so many inducements are made to secure pleas of guilty. To make matters worse, the Legislature of Indiana, in order to induce the prosecutors of the state vigorously to prosecute violations of the prohibition law, provided much more liberal fees for these cases. For a successful prosecution of a violation of the state liquor law of either felony or misdemeanor grade, the fee is twenty-five dollars. Thus, the carrying of one bottle of liquor in an automobile may lead to five fees for the prosecutor, for each of the following distinct offenses: "transportation," "possession," "receiving," "intoxication"

and "driving while intoxicated." The possibilities of fees in a series of criminal charges growing out of a single transaction amount to one hundred twenty-five dollars. By way of contrast, a former Indiana prosecutor cited a murder case which he had tried. His labors in this case extended over a period of a year. He estimates that it cost him four months of work. He visited two states, and brought witnesses from four states. He secured a conviction and earned a fee of ten dollars, which he was unable to collect from the estate of the person convicted. On the other hand, the same Indiana fee system yielded enormous returns to the prosecutors of the large counties until the legislature of the state very recently placed them upon a salary. A reliable estimate placed the annual return in one year in Indianapolis at more than one hundred thousand dollars. An attempt to eliminate the iniquitous fee system and at the same time to discriminate among counties with wide differences in size was made by the state of Missouri in 1919, when prosecutors were placed upon a salary schedule ranging from one to five thousand dollars a year in accordance with the population of the county, with special provision for the large urban counties.* However, with the office in most of the counties on a part time basis, the prosecutors are able to adjust their time in such a manner that the faithful are still penalized.

In 1926 the Supreme Court of the United States decided that legislation providing that the compensation of a

*For the details of this legislation and a criticism of it see the *Missouri Crime Survey*, p. 117.

magistrate should depend upon conviction, denied the accused due process of law. The same decision declared however that such an objection does not apply to the compensation of prosecutors in the same way. "It is further said with truth that the legislature of a state may and often ought to stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the state and the people." *

Salaries of assistant prosecutors in the large cities probably average not far from thirty-five hundred dollars per year. The first assistant in Dallas receives four thousand eight hundred dollars, while the minimum is two hundred a month. The salaries of the Los Angeles staff were reported in 1927 to be "from two hundred twenty-five dollars to four hundred dollars a month, and a majority under three hundred twenty-five dollars." The salary range shows exactly what is implied in the entire service. It is sufficient to attract very young practitioners and it holds them a short time until the valuable connections which the office affords enable them to go into private practice on favorable terms, or to move on to a better political berth.

One of the chief assistants in the Los Angeles office, commenting upon the type of assistants appointed, stated that "we get young men and old men who are newly arrived in town. In not one instance in ten does a new deputy have more than one year's experience at the bar." Only occasionally does the love of the service hold an

* Tumey v. Ohio, 273 U. S. 510 (1926).

assistant over a period of years and then only when his familiarity with the routine becomes so important that political changes in the headship of the office leave him undisturbed. Often a political change results in a clean sweep.

The inadequacy of the facilities with which most prosecutors work results in the state seldom being so well represented in criminal cases as the defense. In the *Missouri Survey* * the report dealing with prosecution concludes that their work is definitely marked by "poor facilities and poor preparation." In fact, twenty-five per cent of the prosecutors concurred in this opinion, including the circuit attorney of the metropolitan district represented by the city of St. Louis. Aside from the two dominant weaknesses in American prosecution, inadequate personnel and politics, which we shall consider in detail in another chapter, the reasons ascribed by Mr. Lashly are inadequate coöperation by other peace officers, lack of legal assistance and insufficient clerical and library facilities. He states that the sheriffs are of practically no assistance in the preparation of cases. The labor of interviewing witnesses very largely falls upon the prosecutors themselves. The coroner likewise, with his inquest, is of slight assistance and is often the cause of serious difficulties in the subsequent prosecution of murder cases. Mr. Lashly's comments and conclusions concerning the inadequacy of other types of assistance deserve a somewhat extended quotation:

* Lashly's "Preparation and Presentation of the State's Case" in the *Missouri Crime Survey*, pp. 113-160.

"The prosecuting attorneys of Missouri are, in the main, unable to prepare the state's case with anything like the thoroughness that the average civil case is prepared. The results are likely to be disastrous, for even if the prosecutor is able to get a conviction, if the case has not been properly prepared on the law or if the prosecutor is unfamiliar with the principles of law involved in the specific case, there may be a reversal on appeal which usually results in dropping the prosecution.

"In a vast majority of counties in Missouri the prosecuting attorney has no clerical help of any kind. The county court in some instances will authorize the employment of a clerk or stenographer, but the counties in which this is done are the very rare exceptions. In some of the smaller communities where the criminal docket is light, no clerical or other assistance is needed, but there are numerous counties where the prosecutor is called upon to handle a large number of cases of various kinds, in addition to hearing complaints and handling the routine of his office, and is in need of such aid, where the county court has refused to authorize any clerical assistance whatever.

"To the question 'Does the county court authorize the expense of clerical help which you may need?' seventy out of eighty-six prosecuting attorneys answered in the negative. It is inevitable under such conditions that the prosecuting attorney will be unable properly to prepare his cases. The county court upon certificate of necessity signed by the circuit judge, should be required to authorize the employment of such clerical assistance as the prosecuting attorney requires for the proper and efficient handling of the business of his office, the same to be paid out of the general fund, and in the larger counties the law should provide a contingent fund to be used by the prosecutor in paying the expenses of securing attendance at the trial of necessary witnesses and in the preparation of his cases.

"The circuit attorney of the City of St. Louis has a contingent fund of $5,000 which, he claims, is soon exhausted and should be at least $10,000 per year. He admits that he is not able to prepare

his cases on the law and facts as well or as thoroughly as the average practitioner in St. Louis prepares the defendant's case . . .

"In addition to lack of assistants, the average prosecutor in Missouri has inadequate library equipment to prepare his cases, on the law. There are so many laws and decisions of the courts of last resort which control the trial of a criminal case, that the prosecutor must have access to a multitude of statutes, digests and appellate court reports before he is in a position to go into the trial of any important case. Such a library and service as are necessary to keep in touch with the statutory law with its frequent amendments and with the decisions of the courts which are constantly appearing involve no inconsiderable expense, sometimes beyond the ability of the prosecutor in a small community to meet out of the salary of his office. 31.4% of the prosecutors of Missouri report adequate library facilities; 51.16% have but meager library equipment; the others have the Missouri reports and digests but very few other reference works. The county court of every county in the state should be required upon certificate of the circuit judge to provide such reference books as the judge and prosecutor shall deem necessary to the proper conduct of the office." *

In the Cleveland survey Alfred Bettman, a likewise competent observer, notes the "serial unpreparedness" of the prosecutor's office in these terms:

"In general, the prosecuting attorney and his assistants take no part in the investigation of the crime or the molding of the proof. He has no machinery, other than his busy assistants and the single county detective or general utility man, for detection of the offender or discovery of proof. He has no facilities for modern methods of criminal investigation. He pits his unpreparedness, with such assistance as he may obtain from the police department, against the carefully prepared case of the defendant's attorney. He takes the proof in the way it has been prepared by the police

* *Missouri Crime Survey*, pp. 136-140.

or municipal prosecutor, making the best of what he gets, or, in more serious cases, attempting to remedy the defects or omissions. An unusually sensational case sometimes affords an exception to this practice, but the exceptions are few." *

In the preparation of criminal cases the American prosecutor is often greatly handicapped by inadequate police assistance. As we shall see in a subsequent chapter, the prosecuting officers of England and Canada disclaim responsibility for the expert detective service which is necessary in the investigation of criminal complaints. Their position is that such tasks are essentially the work of police and they expect and receive the full coöperation of police detective services. English and Canadian police are expected to take the initiative in criminal investigation and in fact, do so. In the United States, as we have seen, the whole conception of the public prosecutor's office is that of an official who exercises initiative, and who is in fact, the mainspring of law enforcement. This being true, he cannot assume the attitude of a lawyer to whom a case comes ready for the application of a lawyer's technique. If evidence is not immediately available and he has reason to think that it can be secured, he is supposed to get it. This means the necessity for detectives working under his direction. Provision for such detective service in the United States takes a variety of forms. There are cities where almost complete coöperation exists between police department and the prosecutor. In New York City, for example, this is true largely because of the existence of Tammany Hall which usually provides complete unity

* *Criminal Justice in Cleveland*, p. 169.

of action within many units of local government. The district attorney and the police commissioner usually have a common master on Fourteenth Street; consequently, the district attorney of New York County is able to say: "Many persons think I am a detective. I am not. It is my job to prosecute, not to detect crime. I allow the police to do their duty, and they are doing it well in the task of detecting persons accused of crime." In some cities, notably Chicago, a large staff of detectives is permanently assigned to the prosecutor's office. These detectives are paid and disciplined by the police department, but receive their assignments from and are used by the prosecutor. This method has dangerous possibilities. Not many years ago a political feud between the city administration and the state's attorney resulted in the complete withdrawal of all the detectives assigned to the state's attorney's office. In a more harmonious period, during the last year and a half of Mr. Crowe's administration, the state's attorney was permitted not only all the detectives which he needed but was allowed to make his own selection from the personnel of the police department.*

In other cities provision is made in the prosecutor's

* The danger of serious lack of harmony between the two agencies is illustrated, however, by the rapid changes which took place in 1928. For a time during that year, the state's attorney and the commissioner of police were not only harmonious friends politically, but cousins. It was said that the appointment of this particular commissioner of police by Mayor Thompson was inspired by the state's attorney. In August, 1928, however, a new commissioner of police was appointed, but relations remained friendly. In November, 1928, the election of Judge Swanson as state's attorney indicated the probability that during the remaining two and a half years of Mayor Thompson's term, a state of antagonism will exist between the two offices because of their allegiance to two opposing Republican factions.

budget for a staff of detectives exclusively for his use and permanently a part of his official family. Occasionally these are capable detectives, graduates from police departments and drawn to this service because of superior pay or greater freedom. More often, however, they are mere political retainers, inexpert in criminal investigation. In one city the prosecutor stated that their chief use was as "jury pickers," that is, they sat with the prosecuting attorney during the selection of jurors and because of their encyclopaedic knowledge of all sorts and conditions of people in the county, they were able to guide the selections with regard to the interests of the state's desire to win. One can imagine the great value of such men on election day! In Cleveland county detectives were always the most servile of political camp followers. Their duties as members of the staff were limited to the service of an occasional process and to running errands.*

* The very important questions involved in the preparation of cases in which police are concerned carries us into the whole subject of American city police administration. We have omitted a consideration of urban police from this book chiefly because the literature on the subject is already quite voluminous and adequate. See, for example, Fosdick's *"American Police Systems"* (New York, 1920). Also the excellent chapter on police in the Cleveland Survey, the work of Mr. Raymond Fosdick and Leonard B. Harrison. See also the various reports of the National Institute of Public Administration embodying administrative studies of specific police departments by C. Bruce Smith. Two of these are contained in the *Missouri Crime Survey* and in the *Report of the New York State Crime Commission for 1927.*

CHAPTER IV

WHEN POLITICS SEASONS JUSTICE

THE methods by which a prosecutor may build up political power through his control of law enforcement are implicit in the foregoing chapters. The prosecutor has the choice of a very considerable number of ways by which criminal prosecutions may be discontinued or reduced in seriousness. His discretion is a vital factor in large numbers of cases in which political leaders of both parties are interested. He can influence many of the members of the bar who practice criminal law, and, as they are in the main politicians, he finds their support a political asset of importance. His good will is vital to the business of professional bondsmen, and these men are almost invariably small political potentates. The distribution of favors, such as delay in trials, acceptance of pleas to a lesser offense, intercession with judges for reduction of bail or leniency in sentencing, can become a means of securing the loyalty of a large group of political workers.

The acquisition of power comes, not only through tempering the force of the law but frequently by its vigorous enforcement. Punishment through criminal prosecutions may become a means of party discipline and many a re-

fractory political lieutenant has been brought to a recognition of the importance of his political superiors through the intervention of the prosecutor. Business interests of various kinds are frequently placed under deep obligations to the prosecutor through the active prosecution of their enemies. Particularly is this true of such tradesmen as jewelers, furriers and gasoline dealers, because of the frequency with which they are afflicted with burglaries and robberies. Employers of labor, moreover, care very deeply at times for the vigorous prosecution of labor leaders. Thus, the prosecutor gains votes, sometimes by not prosecuting at all, and sometimes by prosecuting, either for spite or for favor.

These more crude examples of politics in prosecution are fortunately not the most noteworthy political aspects of the office. Much more important is its publicity value. No other local officer has so superb an opportunity to dramatize himself. The psychologists tell us that sexual passion and fighting are the two forms of "human interest" that transcend all others. When Walter Lippman, in commenting upon these forms of interest,* stated that "the sexual motif figures hardly at all in American political imagery" but that the "fighting motif appears at every turn," he overlooked the possibilities of the prosecutor's office. The prosecutor may conveniently pick from the mass of materials at hand, cases which possesss every possible motif, including that of sex. Consider the deliberations of Mason, the District Attorney in Dreiser's *American Tragedy:*

* *Public Opinion* (New York, 1922), pp. 164-165.

"'That's true,' replied Mason, tactfully, but made intensely curious by the fact that it had at least been partially established that the girl in the case was not as good as she should have been. Adultery! And with some youth of means, no doubt, from some one of the big cities to the south. The prominence and publicity with which his own activities in connection with this were likely to be laden! At once he got up, energetically stirred. If he could only catch such a reptilian criminal, and that in the face of all the sentiment that such a brutal murder was likely to inspire! The August convention and nominations. The fall election.

"'Well, I'll be switched,' he exclaimed, the presence of coroner Heit, and a religious and conservative man, suppressing anything more emphatic. 'I do believe we're on the trail of something important, Fred. I really think so. It looks very black to me—a most damnable outrage. . . .' He looked his old friend squarely in the eye. 'This may turn out better than we think. It looks to be the biggest and most important case in all my term of office, and if we can only clean it up satisfactorily and quickly, before things break here this fall, it may do us all some good, eh?'

"'Quite so, Orville, quite so,' commented Fred Heit. 'Not, as I said before, that I think we ought to mix politics in with a thing like this, but since it has come about so——' he paused, meditatively." *

It is not strange that with such "human interest" at command, the office of prosecutor has come to be greatly influenced by modern newspaper enterprise. Public service has always suffered from the inexorable rule of news-

* Not long ago, in one of the large cities of the West, I heard an assistant prosecutor say to his chief:

"This polygamy [meaning bigamy] case has come up again. The first wife wanted to prosecute and then wanted the prosecution stopped. I told her that I wouldn't dismiss the case but if the defendant would plead guilty he would get a parole. I'd just as soon try it anyway. It would be great publicity."

gathering that the thing which is most worthy of notice is the unusual. An official who labors hard and long, performing the prosaic but necessary activities that constitute the major part of public service, is poor "copy." The one who does the spectacular at the expense of the routine is rewarded with public notice. Nowhere is this tendency so marked as in prosecution. A sensational felony case can "make" and in many instances has "made" a notable political career. A successful murder prosecution may elevate a prosecutor to the governor's office. One case is on record in which the promotion came so quickly that the new governor had the opportunity to deny a pardon for the defendant whom he had so successfully prosecuted.*

A young man of education and ability, son of the Chief Justice of the United States, makes the following pertinent comment after serving as prosecutor in one of the large cities of the United States:

"There is no problem of the prosecutor that causes him more worry than that of publicity. If he is conscientious, if he wishes to do a good job, it is frequently desirable and sometimes necessary that he should remain in office for longer than a short single term. Shall he try his cases in the newspapers? Shall he give the reporters the news that they want as fast as it is produced in his office? If he does, it takes no great effort on his part to secure the tone of publicity that makes him a terror to criminals and defender of justice. He may be forced to publicity for other reasons: because the defendant has started to work on prospective jurors

* Arthur Train, a former assistant district attorney in New York County, draws an interesting picture of a publicity hunting district attorney in his novel, *The Blind Goddess.*

through that medium, or in order to arouse popular interest and secure the kind of anonymous suggestion that so frequently leads to the solution of crimes. But suppose it is a case that calls for none of these things? Shall he keep his mouth and his office shut and let the news develop in the court room as it should, where it becomes a matter of public record, and then find that his slips are magnified, his accomplishments twisted, and his reëlection made impossible?

"From the public standpoint, shall a defendant be allowed to try his case in the newspapers with material that is not admissible evidence in court and to get himself acquitted on a wave of popular sentiment manufactured by himself and his representatives? It may be, and probably is, true that the legal profession in those matters of criminal law and procedure where its own members are at fault, could do more; yet it seems high time that the editorial department of the newspapers should develop more control in matters of crime and crime news over the news columns." *

A study of the personalities who have been drawn to the prosecutor's office emphasizes its political character. It has drawn and probably always will draw some men of promise and ability, but more frequently it attracts them as politicians rather than as administrators and lawyers. The result is that while American prosecution leaves much to be desired as a process of law enforcement, the office is of enormous significance in the public life of the nation.

This is clearly shown by a study of the careers of those lawyers who have held high political office in the present generation, including all lawyer members of Congress

* "So This Is Justice," by Charles P. Taft, II, *World's Work*, Vol. LVI, pp. 97-98.

in 1914, 1920 and 1926, and governors of states in 1920 and in 1924.*

The number of persons included in this compilation was 767. Of these, 319 or forty-two per cent had been prosecuting attorneys. Of the latter, 239 or seventy-five per cent had held that office as the first one in their political career, while for seventy-one or nineteen per cent it was the second. In 269 cases it was possible to determine the time of admission to the bar and also of election or appointment to the office of prosecutor. Of these the median number of years elapsing after admission to the bar before attaining the office of prosecutor was five. Twelve were elected or appointed the year they were admitted. The median number of years of service was less than four. In sixty-two per cent of the cases the office was held four years or less. This sample, drawn as it is from the nation as a whole and therefore fairly typical, shows that the American prosecutor attains the office very early in his legal career, holds it only a short while, and finds it a very successful way to attain the public attention necessary to be elected to higher office.†

A young lawyer, aged thirty-two, who two years before

* In assembling these data, I had the assistance of Miss Helen Robinson, a student in the Law School of Columbia University. We included in the compilation the Attorneys General, the First Assistant Attorneys General and the Solicitors General in 1914, 1920 and 1926.

† An interesting continuation of this study might be a determination of the importance of the prosecuting office as compared with other methods of beginning a political career. It is probable that no office is so frequently held early in statesmen's lives, with the possible exception of membership in the lower house of the state legislature. Limited to lawyers such a study would probably show that the prosecutor's office is even more important than the legislature. We did not pursue this study because we were primarily interested in prosecutors and only incidentally in the making of statesmen.

had completed four years as county prosecutor in a semi-rural county, said reminiscently of his period in the public service, "Now that I am over that hurdle——." This remark illustrates the attitude with which the office is regarded by those who hold it. It is sought not because it offers a career in itself but because it provides valuable connections for some other kind of career. It furnishes a young and obscure lawyer with publicity. It gives him experience in trial practice which will help in defending cases later. It provides contacts with influential persons in the community. For either a career in politics or in the practice of law, these are important. The office itself is unprofitable, and to remain in it long is to create the unpleasant impression that the incumbent is unable to make a living at the practice of law. It represents to the lawyer (especially in rural districts) exactly what service as an interne means to a physician. The *Missouri Crime Survey* * through a questionnaire, determined that the median age of the prosecutors of the state was "between twenty-five and twenty-nine" years, that the median term of practice at the bar before election was from one to four years, that a considerable majority served in the office not over four years, and that six years of service was comparatively rare. In the Illinois survey it was found that the median age of prosecutors was forty-one, and that the median number of years of practice was ten. The median length of service was four years. This is somewhat surprising in view of evidence which we have of the youth of prosecutors in other states. Illinois is probably excep-

* Op. cit., p. 131.

tional. The Missouri report reveals that half of the prosecutors of that state were graduates of the state university law school, and in Illinois a majority were graduates of law schools within the state. Such information as we have from other states confirms the view that the office is used largely to build up legal and political careers. A study of the office in Virginia says that "the office is usually occupied by a recently admitted member of the bar, who views it as a kind of training place." * This remark may be considered typical.

The political and personal elements considered in the foregoing general comments apply to the vast majority of such officials in the United States, who are, of course, for the most part rural officials.

In the large cities, the political character of the prosecutor's offices stands in sharp relief.† They may be parts of a well integrated political machine and as such constitute only a principality in a larger kingdom. Such is the case in New York County, Kings County, Philadelphia, Cleveland, San Francisco and Buffalo. They may, on the other hand, constitute in a factional political field a single semi-autonomous unit, as in Los Angeles, St. Louis or Detroit. They may dominate the whole political scene, as in Chicago. The office of the district attorney of New York County is, of course, one of Tammany's most valued

* *County Governments in Virginia,* prepared by the National Institute of Public Administration, 1928.

† I am here speaking of prosecutors who appear in felony cases. Many of the cities have a city prosecutor whose responsibility extends to city ordinance violations and in some instances to state misdemeanors and preliminary hearings in felony cases. These general observations, however, apply to these offices with equal force.

possessions. Its offices are with some limitations Tammany offices. For example:

"William L. Kavanagh, chief clerk in District Attorney Joab H. Banton's office at $7,000 a year, is to get the position vacated by Mr. Dietz' promotion, at $7,500 a year. The place thus vacated in the District Attorney's staff will go to Terrence F. McKeever, now an examiner for the Board of Aldermen at $5,500 a year. Mr. Kavanagh is a Tammany leader in the Third Assembly District, and Mr. McKeever is Tammany leader of the Ninth Assembly District." *

In Philadelphia, the death of the district attorney in 1925 brought to the office a former assistant of high ability and genuine idealism, Charles Edwin Fox. This political misfit was, however, abruptly turned out by Boss William L. Vare in the autumn of 1927, and the old order reigned once more.

A large city in the South suffered a prosecutor for two terms who was elected by the Klan, in which he openly held a responsible office. A reliable lawyer, in the city thus afflicted, states that the prosecutor "never tried a case before his election." He was a clerk in a law office.† While in office, he depended almost entirely upon his assistants for the transaction of the business of his office. In another very large city, in the North, the elected prosecutor graduated from a third-rate law school into the city prosecutor's office, and from there into the elective prose-

* A news item cited in "The New Tammany," by Joseph McGoldrick, *American Mercury*, September, 1928.

† A story is told of this prosecutor to the effect that a negro, who was offered by the court the opportunity to have counsel, refused, saying that "if the state can get along without a lawyer, I can too."

cutor's office. Lawyers of standing in the city would not admit that they would, under any circumstances, employ the prosecutor to try a case. It was generally conceded that he knew no law but much about the art of politics. In another large city the elected prosecutor has apparently never practised law. He does not ever attempt to try cases but looks after the political aspects of the office. Another elected prosecutor in a large city was found, by an investigating committee of responsible lawyers, to be possessed of such unfortunate habits as to render him almost unfit for public service. According to a member of the investigating committee, he was "caught in a bootlegging establishment, with his coat off, behind the bar, serving the customers."

The following is a description by a veteran practitioner at the bar in another large American city of the elected prosecutor there:

"He is an astute politician; his political speeches electrify; he is a good judge of the public pulse; he knows the value of newspaper publicity. He is an eloquent campaigner and a lurid prosecutor before the jury. He is shrewd, cunning, vitriolic, and forceful. Vehement in his denunciation, he is the type of prosecutor who talks to the jury abut tearing down the court house, burning the law books and turning the community over to anarchy. Occasionally, however, his forensic efforts are attended by disaster because of improper conduct subsequently disapproved by the appellate court. While cases involving publicity are tried quickly, he permits many simple cases on the docket to drag. Frequently major cases have not been set for trial for months after the return of the indictments. In one notable case, nearly a year elapsed although the burden of litigation does not overwork his office.

He does not actually participate in prosecutions save on special occasions." *

In St. Louis in 1926, an indictment was returned charging Circuit Attorney Howard Sidener, his assistant, and three other persons, with conspiracy in connection with a criminal case which had been compromised under unusual, not to say suspicious, circumstances. The prosecutions in this case failed, but the fact that the indictments were brought by a grand jury which served with the attorney general of the state and another lawyer of great prominence and integrity lends unusual significance to the condition which the indictments describe, although individual wrong-doing was not proved. In this case, a wealthy man had been indicted for a brutal and unprovoked murder. When this murder case came to trial, a compromise was arrived at by which a fine of $500.00 was accepted by the state. This unusually lenient treatment provoked the inquiry which resulted in the conspiracy indictments. Another indictment was returned charging the circuit attorney and a special prosecutor with compounding a felony and still another charging the brother of the defendant with bribery.† In connection with this investigation, the gravest sorts of improprieties on the part of the prosecutor's assistant were published. It is a commentary upon this case that in spite of these

* From a private manuscript prepared at my request.

† The *St. Louis Star* on June 2, 1926, stated that the brother of the man charged with murder "told a reporter for *The Star* that he spent nearly $15,000 to keep his brother out of prison."

facts, the assistant in question remained in office under the accused prosecutor.*

Perhaps the most extraordinary example of the political exploitation of a prosecutor's office is the story of the eight years of power enjoyed by Robert E. Crowe, state's attorney of Cook County, Illinois, from December, 1920. Crowe is a native of Illinois, a graduate of the public grammar and high schools and of the Law School of Yale University. After a short period of private practice, he served as assistant corporation counsel and later as assistant state's attorney for several years. He then became a judge of the circuit court and served there until his election to the office of state's attorney. He was serving as chief justice of the criminal court at the time of his election as state's attorney in 1920. In 1924 he was reelected, but in a revolution in the primaries of 1928 he lost a renomination by a majority as large as that by which he was first elected.

Politics in Chicago, especially within the Republican party, centers in a number of groups or factions. The most powerful of these between 1920 and 1928 was the so-called Crowe-Barrett group. Crowe's associates in this alliance were two brothers, George F. and Charles B. Barrett. The three had been schoolmates, neighbors and intimate friends on the West Side of Chicago. At one time, the three constituted a law firm under the name of Barrett, Barrett and Crowe, from which Crowe's name was subsequently

* As this book goes to press the newspapers report that District Attorney Asa Keyes of Los Angeles has been indicted for conspiracy in another sort of a compromised case.

dropped. George F. Barrett was elected judge and served in that capacity with Crowe. Charles B. Barrett became a member of the Board of Review. When Crowe was elected state's attorney, his associate, Judge Barrett, resigned from the bench and resumed the practice of law and acquired a considerable criminal practice. He availed himself of the opportunities which his retirement from the bench and his private practice offered to participate actively in politics. Charles B. Barrett, as a member of the Board of Review, had very considerable influence in matters affecting the valuation of property for taxation. The power of the Crowe-Barrett machine extended also, to a very considerable extent, to the bench. Many of the judges of the circuit, superior and municipal courts appeared to be sympathetic to the Crowe power and were commonly called "Crowe judges." The judges of the circuit court appoint the South Park commissioners, and it is not difficult to see that the strength of the Crowe-Barrett machine came to be augmented by its power within this board, which at the end of 1928 consisted of two Democrats, two Crowe Republicans and one Deneen Republican. After the return of Mayor Thompson in 1927, the power of Crowe was greatly increased by a perfectly harmonious alliance with the city administration. Mayor Thompson appointed as chief of police a cousin of Crowe's, Michael Hughes, who had been chief of detectives in the earlier administration of Thompson and had been cared for in the interim by appointment as chief of the County Highway Police, apparently through the influence of the Crowe-Barrett machine. Thus, the power of State's At-

torney Crowe, when it reached its maximum in 1927, extended to almost every governmental agency in the great urban district of Chicago. It was based upon its great influence in the city administration, in the circuit, superior and municipal courts, in the South Park Commission and in the Board of Review. To all this should be added the political value of the state's attorney's office itself, which appointed scores of assistants, dealt with twelve thousand felony cases a year, and consequently controlled the enforcement of criminal law in Chicago. We have already described the circumstances which preceded the downfall of Crowe. They seemed to be in part the result of too confident a reliance upon the continued indifference of the bar and of leading business men. Nevertheless, the career of Crowe as state's attorney is a great epic in American politics and vividly illustrates the tremendous potential resources of the prosecuting attorney's office.

Assistants in the large urban prosecutors' offices are poorly paid and politically selected. With a few exceptions, the lawyers composing the staffs are incompetent and untrained. The need for "representing" in the prosecutors' offices the diversified racial constituency of many of our large industrial cities has dictated the appointment of many assistants who barely rise above the literacy level. One of the inevitable consequences of organizing an urban prosecutor's office upon a political basis is the demand that in the selection of assistants the representative idea be recognized. The management of politics in large Northern cities is constantly confronted with prob-

lems of nationality nearly as serious as those which the Hapsburgs met so long in the Dual Monarchy. The most convenient way to secure the votes of a national group is to select as a lieutenant a prominent member of that group. In recruiting a prosecutor's staff the problem consists in selecting not only leaders of the various groups but lawyer leaders. Here is where the difficulty arises. In many of these groups, the young men who have entered the learned professions are still not numerous. The really able ones find such a favorable opportunity in private practice, particularly among their own compatriots, that they are not available for public office. Those in politics who have sufficient influence to attain the prosecutor's staff are usually inadequately prepared. The result is a prosecutor's staff that is rich and colorful in national diversity and in racial affiliations, but is seriously lacking in capacity for the prosaic business of trying cases in court. We have what Alfred Bettman has aptly called the "tribalization of prosecution." In one staff, for example, there are Jewish, Irish, Italian, Magyar, Slovak, Polish, Negro and German assistants. There is an assistant selected because he has been a "labor" lawyer. There is a woman, presumably to represent the women of the community. There are "representatives" of the East, West, North and South Sides of the city. There are "representatives" of three different factions of the party. Finally there is a survivor of several previous "administrations" whose knowledge of the law is great and whose special ability in difficult fraud prosecutions is well known. The powers appointing the staff reluctantly waived his politi-

cal worthlessness because they were afraid of the ire of business men who have grown to depend upon this person, and fearful that, without someone who knew the routine of the office, the new administration might not be able to get under way at all.

The ability of the members of an office chosen in this way is, of course, far from that which is needed in meeting the experienced defense lawyers of the city. In the Cleveland Survey * a questionnaire addressed to members of the bar indicated that ninety-two of the ninety-four who replied considered the staff "lacking in the necessary ability and competence." With such a Falstaff's army of assistants it is small wonder that certain prosecuting offices compromise so large a proportion of their cases.†

There are many members of prosecutors' staffs who obviously and openly live beyond the modest salary they receive, augmenting their salaries by profits from private businesses which are related to their political connections. There are a few who undoubtedly receive income from beneficiaries of "fixed" cases, although dishonesty is probably not sufficiently common in the large prosecuting offices to be important. It may be assumed that few of the elected prosecuting officers are themselves tainted with dishonesty. The overwhelming majority would not countenance dishonesty among their assistants. But no prosecutor's office is immune to the demands of politics. An observer, "deep in the know" of a large American city,

* *Criminal Justice in Cleveland* (1922), p. 167.
† Chapter VIII.

said that the prosecutor there is "money honest but politically crooked," a strange but explainable terminological distinction.

It is not only through the staff itself that prosecution is handicapped. There are always camp followers who with or without justification claim relationship to the official family. In one of the great cities of the United States the prosecutor retains in a clerical position a person who openly asserts that he is the "political manager" of the prosecutor. It is known to every one who visits the court house frequently that this person is "the one to see," and if the allegations of many witnesses are to be trusted he has been "seen" many times. Whether he makes good his efforts to adjust matters or not, the very fact that he is so known is a political and perhaps financial asset to him. Such "inside men" may exist wholly without official status.

The classical example of the unofficial political camp follower was Jess Smith, the friend and intimate of United States Attorney General Daugherty. The position and activities of Smith as described to the Senate committee investigating the Attorney General are so characteristic of what is implicit in the political nature of American prosecuting offices that they deserve some comment here.* There is in this a great deal of evidence that cannot be too confidently accepted. Some of it was given by shady characters who had motives to prompt unfavorable testimony. With all allowances, however, we may accept cer-

* *Hearings before the Select Committee on Investigation of the Attorney General,* United States Senate, Sixty-eighth Congress, First Session. Pursuant to S. Res. 157. 3 vols. (Washington, 1924).

tain facts and conditions as substantially true. Smith was an old friend of the Attorney General. He was a merchant in Mr. Daugherty's home town in Ohio, and when his friend went to Washington as chief national law officer he went along. They were very intimate friends, and they spent a great deal of time together out of office hours. Smith wandered about the Department of Justice at will. He often sat at the Attorney General's desk in the latter's absence, dictated to the stenographers of the Department, read messages to the Department from United States' marshals and federal attorneys, carried files of the Department to his own office.* This familiarity round the Department gave rise to the impression that he was actually "next in authority to the Attorney General," and that he handled much of the "job" patronage of the Department. He was, to say the least, a sort of confidential and unofficial secretary to the Attorney General. This being true, those having favors to ask of the Department received the impression that Smith was a great power in the administration, and that he could get what he wanted. After his death had removed any possibility of refutation, the most astounding stories of "fixing" and graft abounded, many of which were probably greatly exaggerated.†

Even if it be assumed that this curious relationship had no illegal aspect at all and that Smith misrepresented his influence, the situation illustrates what political domination of a great law enforcing department may involve.

* Testimony of Pierce Miller, journalist, 3 ibid., p. 2470 et seq.
† See, for example, the lurid tale of George Remus, 3 ibid., p. 2395 et seq.

To save himself from seekers of offices and favors, an attorney general or a prosecutor may accept the assistance of an unofficial buffer. Politicians seeking both what they have a legal right to get and what they have no right to ask are received with cordiality. But evasive answers may be misconstrued, sinister meanings can be read into jovial and kindly generalities, and promises to "do something" may sound like assurances to do the thing requested. Unofficial friends of those in power often promise things they cannot fulfill. It is not the misfortune of kings alone to be surrounded by those who "take their humors for a warrant . . . and on the winking of authority, to understand a law." Attorneys general and prosecutors high and low, may be the innocent victims of their own political methodology.

During the Daugherty hearings an interesting comment was made by a competent lawyer, John W. H. Crim. As a special assistant to the Attorney General, he had come to know the quality of the office personnel in Washington and that of the United States District Attorneys' offices throughout the country, and he called attention to the inability of many appointees to perform their work in a satisfactory manner and the need of taking the Department out of politics:

"Mr. Crim. You know what I think—I think it would be a very good idea to take the Attorney General out of politics by taking him out of the Cabinet. The general counsel of a railroad corporation very often is not a member of the board of directors. Get a good lawyer as Attorney General who knows this complex and concrete machinery and keep him. We have had one shining

example in the history of this country of what taking the department out of politics will do, in the administration of William Wirt, who served this country as Attorney General for 11 years and did more to develop that office than any two other Attorneys General of the United States. Establish a promotion not on political expediency, not trading among bootleggers, but merit in the service, and let the office boy in the United States district attorney's office at Chicago feel that he has a reasonable chance to become Attorney General of the United States by honest effort.

"The Chairman. I believe that is the best suggestion you have made. I think the politician as Attorney General is about the last thing we ought to have.

"Mr. Chamberlain. Congress can cure that, can it not?

"Mr. Crim. It can. You take the best lawyer that America has to-day, that has never been in that office, and put him there, and it will be a year before he knows anything about his latitude or longitude, before he is sure of his ground, and then it will take him a year to get assistants around him of the type that he needs, and then he has got a year to function when he is drawn into a political campaign. Now, it is a big question, Senator.

"Senator Jones of Washington. And also aside from that it is almost impossible for him to get the proper men around him with the compensation we provide.

"Mr. Crim. Some difficulty anyway. As for me, I never cared anything about the compensation, just so long as I could have a place to live, and plenty of libraries to go to and a few people to talk to of a night. The money never bothered me.

"The Chairman. Well, it is the lawyers of your type that we are looking for for these jobs. There are plenty of others that have that same patriotic viewpoint."

On another occasion Mr. Crim ventured the opinion that "not more than ten of the Federal District Attorneys were competent to handle their offices. They had been

selected not because of their ability but because of their fealty to some politician." *

Thus the American prosecutor emerges as a completely political official. By virtue of the great advantages which the powers of the office lend to the political machine and the tremendous publicity values in the materials with which it is concerned, it has come to be sought as a means to a political end. Its political character is shown in two ways. First the large number of political careers which begin in the prosecutor's office and second in the open and often sinister political domination of the large urban prosecuting offices. It remains to be shown in the chapters which follow the extent to which this office has come to dominate the entire administration of criminal justice. It has to a great extent supplanted the sheriff, the coroner, the grand jury, the petit jury and finally, the judge himself. Politics, embodied in the prosecutor, administers the criminal law, for its own objectives and in its own image.

* A distinguished foreign observer writing twenty years ago found the political aspects of prosecution the most unsatisfactory aspect of the American judiciary. See Alfred Nerincx, *L'organization judiciaire aux Etats Unis* (Paris, 1909).

CHAPTER V

THE MEDIEVAL COLLEAGUES OF THE PROSECUTOR

IF, by some magic, the enormously energetic and forthright Henry II could visit an American court house, his interest would probably be challenged immediately by the presence of the sheriff in the most commodious and comfortable quarters of the building. His thoughts might find expression in some such manner as this: "Seven and a half centuries ago I returned to England from the continent. Numerous complaints were immediately made that my sheriffs had fallen into bad ways. They were charged with oppression and extortion. I made inquiry and found the charges true. Many of the miscreants I dismissed, and the remainder I reduced in power and importance by my Assize of Northampton. Before the end of my reign it was clear to the wisest of my advisors, that the office was on the way to decline and death. Now I find it not only still in existence, but marked with the greatest prosperity. Its functions in a new world are not unlike its duties in my own time. Its power is less, but it seems to have survived the vicissitudes of the centuries better than even the Kingship, which I held myself. This

is the most amazing of all the wonders of the modern world. It is an office truly touched, it seems, with the magic of immortality."

An answer to this perplexed statement might be made in these terms. After the end of Henry's reign the decline of the sheriff continued. Judicial powers, and later, financial powers, were taken away. The name lived but the substance passed. The decline, while very pronounced, extended over such a long span of years that the greatest of English legal scholars has said that "the whole history of English justice and police might be brought under the rubric, The Decline and Fall of the Sheriff." * Today in England the sheriff is a dignified and gentlemanly nonentity who guarantees for one year the proper performance of work in which he plays no part. An undersheriff performs legal routine chiefly in relation to civil proceedings such as the summoning of jurors, the execution of civil judgments, and the returns of the results of parliamentary elections. In America, the office in the early days found some rehabilitation in Virginia, for a few generations approximating the greatness of the medieval office itself. When the tide of civilization drifted westward and a frontier society found itself far removed from central authority, the county sheriff actually became a peace officer. He protected rough, extemporary communities from lawlessness, and caught the imagination of the chroniclers and litterateurs of the Wild West. But this flare of the old glory was soon extinguished. Wherever civilization has come to be highly developed in America,

* Maitland, *Justice and Police* (London, 1885), p. 69.

the office of the sheriff has slowly approximated a profitable but worthless sinecure.

It has lived only because it is a rich prize for a powerful party system. Its simple and perfunctory duties require no knowledge nor skill, but its emoluments are princely. In many of the great counties with a population of from five hundred thousand to three millions, a term as sheriff yields a considerable fortune. Ample political figures have found the office to their liking. President Cleveland held the office of sheriff of Erie County (Buffalo), and Alfred E. Smith, after many years of loyal service in the New York legislature, was sheriff of New York County for a term. But its incumbents are usually party hacks who pay for the nomination by contributing to the party treasury liberal portions of the rich and really unearned fees of the office. No one doubts that the routine duties of the office could be performed at less cost; no one defends the retention of the office as one of the outstanding elective positions of the county; and few remain to claim that as a police officer the sheriff is either adequate or passable. Prohibition has intensified the nuisances of the office. In many counties hordes of deputy sheriffs "search and seize" for the fees that the law permits. Tourists are annoyed by unskilled traffic deputies who make unnecessary arrests for the fees that come to themselves and to grasping justices of the peace. In many instances of industrial warfare temporary deputies, hired because they were imported professional plug-uglies or resident yokels eager for casual employment, have wrought havoc with the possibility of adjusting peaceably the economic questions at issue.

Lord Coke defined the three important functions of the sheriff as, the serving of the processes and writs of the court, the execution of the decrees of the court, and the conservation of peace within the county.* These are about what the law requires the sheriffs of the United States to do today.† In pursuance of the first and second of these duties he carries into execution all orders of the court, both prior to and following the decree or judgment. He serves summonses to defendants, warrants of arrest, subpoenas to witnesses, writs of attachment, and other orders. He summons jurors and during the trial has a limited custodial power over the jury. After the judgment he collects the amount due under the judgment, if necessary by the seizure and sale of property. In some states he attends court and serves as a bailiff. In criminal cases, he has the custody of the accused and temporarily of the convicted. Sometimes he hangs criminals sentenced to death. As custodian of the accused he is the keeper of the jail and is liable for the reasonable care and preservation of the life and health of the prisoners. Largely because of the profits inherent in the fee system of compensating county officers, the functions of process server and jail keeper have largely supplanted that of peace officer. The sheriff is not likely to direct his energies with interest and vigor to the least profitable of his duties, and as a result his value as a peace officer has become negligible. A few states and a small number of large counties in other states have freed themselves from the fee system of compensating the

* Coke Litt., 168.

† They occasionally have duties in connection with the elections, and in a very few states assist in the administration of tax laws.

sheriff. In these instances, however, the salary fixed is usually larger than that of other county officers, and in many cases the attempt to abolish the fee system has not disturbed some of the sheriff's more profitable perquisites. A large majority of American sheriffs are still under the fee system. This means that in general the elected * sheriff runs the office much like a private business or government monopoly. He serves processes of the court in both civil and criminal cases, attends court, and executes its decrees, and the law provides quite liberal fees, which he collects from the county treasury, from the individual concerned, or from some other source. In some states these services extend even to the hanging of condemned prisoners in the county jail.† He keeps the county jail and derives a profit therefrom, as we shall explain presently. Under the fee system he usually hires and pays his own deputies and other assistants out of his profits. In like manner he pays for the automobiles used and the gasoline consumed. In many states he must make an accounting in whole or in part, but in others these financial transactions are entirely his own concern, and when he leaves the office he takes his books with him.‡ The profits from this office range from two or three thousand dollars a year in the small counties to sums in the large counties that have been reliably estimated as approximating one hun-

* The sheriff is elected in every state except Rhode Island. His term in many states is two years, and in an almost equal number, four years.

† In one instance the fee for this is ten dollars.

‡ In Missouri where I conducted the study of the office for the Missouri Crime Survey, this was true in all but five of the counties. Such information as it was possible to collect concerning the profits of the office was volunteered. There was practically no public record.

dred thousand dollars a year. The sheriff of New York County until recently received an income reliably estimated at seventy thousand dollars a year. Such a county as Shelby (Memphis) or Davidson (Nashville) was said by those in a good position to know to have yielded more than twenty-five thousand. It is not strange that such a colossal plum has been so valiantly and successfully protected by the political parties. The office of Sheriff of New York County, for example, has always been regarded by Tammany as one of its choicest possessions. After Alfred E. Smith's long service in the New York Assembly, the party, full of a sort of astonished gratitude because of the fact that so much service had been given without a suspicion of improper reward, gave him the nomination for Sheriff of New York. As a wise member of the Tammany Society explained, "Al had been an assemblyman, and when others had capitalized their opportunities, he had worked hard and taken nothing. Meanwhile his family grew beyond his modest means. So we gave him the nomination for the office of sheriff to reward his honesty, help him raise his family, keep him in public life and help the looks of the ticket." The office in those days was said to be "worth" more than fifty thousand dollars a year.

The service of writs by the sheriff is not only expensive, but often very inefficiently done. Gilbertson writes that in studying the office in Kentucky he found a thrifty sheriff permitting court writs to accumulate until he had a considerable number to serve in certain distant parts of the county. He also reports that in another county writs

of the court were frequently permitted to pass into the hands of people who happened to be going in the direction of the residence of the person to be served.* Almost everywhere the law deems court writs of such importance that they must be carried in the personal custody of a sheriff or his deputy. It is ironical that the sheriff and his deputies, chosen haphazardly and not infrequently from the most unreliable elements in the community, are thus legally declared more trustworthy than the carefully chosen civil servants of the United States Post Office Department.

The most indefensible aspect of the sheriff's office is the manner in which he is usually permitted to reap profits from his custody of the county jail. A fixed amount, usually from forty to seventy-five cents "per day per prisoner," is appropriated from the county treasury and given to the sheriff for feeding the prisoners in the jail. Whatever profit he can make under this arrangement is his own. A powerful economic motive is thus provided to starve the prison population, and in many counties prisoners have given remarkable evidence of ability tc sustain life on a minimum of food. In one county a reliable investigation indicated that the cost of feeding a prisoner was eight cents a day while the sheriff received forty-five. In many counties the sheriff is permitted, either directly or through concessionaires, to sell special articles of food, tobacco or other "luxuries" to the prisoners. He is thus permitted to starve them to the point where they or

* *The Government of Kentucky* by the Efficiency Commission of Kentucky, Vol. I, p. 575. See also *The County*, by H. S. Gilbertson (New York, 1917).

their friends purchase food to supplement the daily ration. He thus enjoys the extraordinary privilege of reaping a profit not only from starvation but from the relief of starvation. A judge who was a member of a committee of judges investigating the feeding of jail prisoners in one of the largest cities of the United States said that in his opinion the sheriff of that county was profiting at the rate of ninety thousand dollars a year. Prohibition has accentuated this problem still more because of the fact that Federal courts find it necessary to "farm out" short term prisoners to county jails. The Federal government attempts to inspect and regulate the conditions under which these prisoners are kept, but with indifferent success. A Federal judge in St. Louis found that a prisoner whom he had sent to a rural county jail had been permitted to visit his home week-ends. The sheriff's profits were reduced that month by a fine of fifty dollars for contempt of court.*

Abuse of his trust as custodian of the county jail has made the sheriff responsible for perhaps the most disgraceful institution in the United States. Criminologists have long recognized that while some improvements have been made in state prisons, the county jail has remained the most unsatisfactory part of the entire American correctional system. The whole striking story of the American jail is told in a vividly written book, Joseph F. Fishman's *Crucibles of Crime*.† The author writes from a rich experience. He was for many years official Inspector

* A most diverting picture of a political sheriff is in *The Front Page* by Hecht & MacArthur (New York, 1928).

† Published in 1923 in New York.

of Prisons for the United States government and in the performance of his official duties he was required to inspect penal institutions. From his choice assortment of first-hand descriptions of American jails we select the following. It is the description of the county jail in the City of Cleveland. "Here in the very heart of the city, practically on the square, and almost directly opposite the new and beautiful Cleveland Hotel, stands the jail. In appearance from the outside it resembles an old-fashioned church. On the inside its appearance is anything but churchly. It is a crying disgrace and festering sore—a white sepulchre in the very midst of this respectable community. The tentacles of disease nursed and propagated here have spread undoubtedly into many a Cleveland home. The place is so old and so saturated with the effluvia of foulness, so poorly lighted and so frightfully ventilated, that it is a matter of practical impossibility to keep it clean. It has, if anything, more than the usual quota of bed bugs and "cooties," and it pollutes the air with a combination odor of disinfectant and worse that is simply overpowering. Some idea of the intensity of its smell may be gained from the fact that they spend approximately $1,200.00 a year for insecticide to give the tormented prisoners some relief from the burden of vermin, so I was informed by one of the jailers upon my last visit there, a comparatively short time ago. Even in these days of inflated prices, the sum of $1,200.00 will pay for an enormous amount of insecticide. The odor of a comparatively small quantity of it, where a jail is so poorly ventilated as this one, is by no means pleasant. Try and imagine the sickening effect

when a jail is literally saturated with it from cellar to roof." *

For fifteen years there have been agitated in the City of Cleveland various proposals for the building of a new county jail. Many bond issues were proposed and defeated largely because of political controversies concerning the kind of jail and the personnel of the building commission. At this date, a bond issue has been carried, but building operations are still suspended because of differences of opinion as to the appointments to the commission. Meanwhile, the jail remains substantially as Mr. Fishman described it.

A serious question bearing upon the enforcement of criminal law is how the sheriff performs the third of Coke's subdivisions of his office, that of conservator of the peace. This function is thus described by the United States Supreme Court: "As conservator of the peace in his county or bailiwick, he is the representative of the King, or the sovereign of the state for that purpose. He has the care of the county, and though forbidden by the Magna Carta to act as a justice of the peace in the trial of criminal cases, he exercises all the authority of that office where the public peace is concerned. He may *upon view,* without writ or process, commit to prison all persons who break the peace or attempt to break it, he may award process of the peace, and bind any one in recognizance to

* I quote this passage because in my official capacity as foreman of the autumn grand jury of 1922, I was required by law to inspect the jail described above. My report fully bears out Mr. Fishman's description and because of the accuracy of this test, I feel certain that his descriptions and conclusions can be depended upon.

keep it. He is bound, ex officio, to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to jail for safe custody. For these purposes he may command the 'posse comitatus' or power of the county; and this summons every one over the age of fifteen years is bound to obey, under pain of fine and imprisonment." * There has been a great deal of controversy, particularly since the advent of national prohibition, as to just how much initiative the sheriff must exercise in matters affecting the violation of criminal law. A Tennessee case reviewed much of the law on this question and decided that while the sheriff is not bound to do detective work or to employ deputies to do it, he must, "when he has notice that an offense is being committed . . . act in prevention and suppression." † It is, however, unnecessary to pursue the legal point as to whether he has or should have the power to act as a police official. The fee system, which we have described, effectually diverts his interests from the active duties of preventing crime and detecting and arresting criminals. As one sheriff puts it, "If I pursue a robber and, after much effort capture him, I receive only seventy-five cents from the county as an arrest fee. I get that much from every subpoena, from every jury summons and every warrant. The amount which I receive from police work does not pay for the gasoline which I would use in the pursuit, to say nothing of the time my deputies use and which I must pay them for." Another difficulty which a sheriff meets in some

* South v. Md., 18 How. 396 (1856).

† State v. Reichman, 135 Tenn. 685 (1923). See also Scougale v. Sweet, 124 Mich. 311 (1900).

jurisdictions is the danger that he may be removed from all participation in a case in which he has actively assisted in detecting the defendant and making his arrest. The laws frequently provide that he shall be disqualified from acting in a case in which he is prejudiced. Prejudice has been interpreted to mean unusual activity in making an arrest. Such removal from a case means the loss of all the fees involved in it, including that which is paid for attendance upon court. This substantial danger of loss deters sheriffs from any undue activity and usually limits them to the actual serving of a warrant of arrest.

The enforcement of criminal law suffers not only in the legal limitations imposed by the law upon the sheriff but in the incapacity of most of those selected for police work.

King John was forced in the Magna Carta to promise not to make men "justiciaries, constables, sheriffs, or bailiffs, unless they understand the law of the land, and are well disposed to observe it." The sovereign American democracy imposes no such restriction upon itself, and unfortunately in many cases observes no such admonition. Men become sheriffs and constables if they can get enough votes, with the simple restriction that they be citizens, and, in some instances, voters. The former occupations of the sheriffs of Missouri in 1925 were as follows:

Farmer 24	Drayman 2	Liveryman 1
Policeman 6	Stockman 2	Butcher 1
Merchant 4	Carpenter 2	Lumberman 1
Contractor 3	Penitentiary guard .. 2	Mechanic 1
Salesman 3	Tinner 1	Storage Business 1
Miner 3	Barber 1	Blacksmith 1

The public offices which they held were:

Constable	9	Assessor	1	Deputy County	1
Deputy Sheriff	8	Mayor	1	Post Master	1
Chief of Police	6	Collector	1	U. S. Marshal	1
Sheriff	3	Circuit Clerk	1	None	28

Their tenure, limited by the state constitution to one consecutive term, effectively prevented ninety per cent from serving over one term of four years. Their ability to protect the public from criminals was described by a very able and courageous governor as "abject failure." *

Practically every civilized country in the world has reached the conclusion that the solution for the problem of policing a rural area is by some form of state controlled police, trained in police work, and professional in the sense that it is composed of salaried, full-time officers. Perhaps the most picturesque example is the police department now known as the Royal Canadian Mounted, formerly called the Northwest Mounted Police. This organization has probably contributed more not only to the realms of romance in literature and drama, but toward setting standards for a higher degree of police integrity and efficiency than any other organization of a similar nature. The fact is that the Royal Canadian Mounted has ceased to function throughout Canada in the way that it did once because the various Canadian provinces have now established their own police departments, and the Canadian Mounted is used only for federal matters such as the control of the drug traffic and the policing of the national parks. However, the various provincial police

* Message of Governor A. M. Hyde, 1923.

departments of Western Canada are to a large extent staffed by officers who served their time with the Royal Canadian Mounted, and quite adequately maintain the traditions of the pioneer police organization. Wherever the British flag has penetrated, similar organizations have been developed. In South Africa, Australia, and New Zealand there is a colorful history connected with the provincial police forces and a very marked standard of efficiency.

Throughout the world it seems to be taken for granted that the suppression of lawlessness and the maintenance of the authority of law is a perfectly legitimate function for a state, and yet certain complications have arisen in the United States which have prevented this simple and obvious feature of governmental protection from wide realization. The state of Texas organized a body of Rangers nearly a century ago. This force was limited to the patrol of the Mexican border. A few state constables were provided by Massachusetts in 1865. The first state-wide professional police department was the Pennsylvania State Constabulary, organized in 1905. Since that time state police have been provided by New York, Massachusetts, New Jersey, Connecticut, West Virginia, Michigan, and Rhode Island. A number of other states have state police units with powers limited to such functions as prohibition and traffic enforcement. Several states have central state identification bureaus.

While the tendency to supplement local law enforcement by state controlled police organizations has made some progress and has been attended with quite general

satisfaction it has failed of more general adoption because of the bitter opposition of organized labor. Serious and to some extent seemingly authentic charges have been made that in a number of industrial conflicts the Pennsylvania Constabulary has failed to represent fairly the interests of both sides. A number of unfortunate experiences in that state has had the effect of turning the active opposition of organized labor against the establishment of state constabularies in other states, and in several instances, notably in Missouri, Illinois and Ohio, this opposition has prevailed.*

The best evidence which we have is that the experiment of state police in these states has not justified the dire predictions of organized labor. They have not generally been used to suppress with ruthless abandon the actions of strikers, and they have served admirably in the control of crime and the setting of high standards of service to similar police departments everywhere. This is especially true in New York, where, under a Republican administration, the police department was created, and where, with a singular degree of non-partisanship, a Republican Governor appointed a Democratic Chief of the Troopers, and where subsequently a Democratic Governor appointed as the successor to this Democrat, a Republican. It is fair to say that the New York State troopers have won the confidence of the citizens of the state. It should be noted that wherever as in New York, Pennsylvania, Massachu-

* For the point of view of organized labor on this point see Maurer, *The American Cossack,* and for a highly favorable description of the Pennsylvania system see Katherine Mayo, *Justice to All: the Story of the Pennsylvania State Police,* 5th ed. rev. (N. Y., 1920).

setts and New Jersey the state police have been established on a sound administrative basis they have not been abolished after trial. They have everywhere constituted an improvement over the old system of amateur sheriffs and constables.*

¶

Closely related to the sheriff both historically and in governmental practice is the coroner. His duties relate to the investigation of all instances in which death has been due to a cause other than a natural one, notably those in which there may be a question of criminal responsibility. In substance, this means homicides, accidents, suicides, and other kinds of violent deaths. To this is added cases in which death has occurred without medical assistance. Thus it is the coroner who must make the important first move in the detection of possible murderers. Upon him rests the serious decision as to whether a murder has actually taken place. According to inherited practice he makes his determination in what is known as an inquest, which is really an examination of witnesses, usually before a jury. On the basis of this inquest the coroner issues a verdict in which the cause of death should be set forth and wherever possible the person or persons responsible. It is a decision obviously requiring expert medical as well as legal knowledge and its significance, particularly in thickly populated urban districts, can readily be appreciated. If a coroner is skillful and avails

* An excellent description of the various state police departments of the United States and an intelligent and sympathetic statement of the problems which they face will be found in *The State Police*, by Bruce Smith (New York, 1926).

himself of adequate medical assistance, many murder cases may be solved immediately and the offender brought to justice. If, on the other hand, the coroner's work is badly done murders may take place in which there is not only no apprehension of the murderer but in which insurmountable obstacles are placed in the way of subsequent investigation. Witnesses scatter and valuable evidence is irretrievably lost.

The office of coroner shares with that of sheriff the doubtful distinction of a great antiquity. Both offices trace their origin far back into medieval English history. It has been claimed, on somewhat doubtful evidence, that the coroner was already in existence during the reign of Alfred the Great. However, we know for certain that by 1194 he was fully established as an officer of honor and importance in the realm. The coroner was named from the Latin "corona" because he was originally the officer of the crown who kept the "pleas of the Crown." He was the guardian of those revenues of the king which flowed from the enforcement of the criminal law. The property of the felon, even to the knife which struck the unhappy victim, was seized and accounted for by the king's coroner. It was also his duty to enquire into "treasure trove" which is, according to Blackstone, money, plate, or other precious metals found hidden in some private place, the owner being unknown. When the sturgeon or the whale were thrown ashore, they were, under the law, the property of the king, and were seized for him by the alert "crowners." Shipwrecks were also His Majesty's property, and these, too, the coroner claimed for his sovereign.

From the earliest times the inquest was held by the free men of the neighborhood before the coroner. Most commonly the inquest jury consisted of from twelve to thirty men who represented "four neighboring townships." This jury served not only to hear evidence but to supply it; its members were required to state from their own knowledge or from hearsay how the deceased came to his death, and the verdict might be "natural death," "misadventure," "suicide," or "murder." It was the coroner's business to record upon his roll the facts revealed by the inquest. There were in medieval England four coroners in each county who received no fixed pay but were excused from certain obligations.

The ancient rolls of the coroners furnish a realistic chronicle of life in the middle ages. The following is a translation from the record of an inquest held at Oxford in the fourteenth century.

"AGNES BURLOND: Saturday, Sept. 9, 1391. Inquest before Thomas Hokyn on Monday before the feast of the Exaltation of Holy Cross, 15 Ric. II, on a view of the body of Agnes, wife of William Burlond, who was found dead and buried in the garden of William, her husband, in the parish of St. Giles, by the four nearer parishes, viz., St. Mary Magdalen, St. Giles, St. Thomas, and Wolvercote, by the oath of Michael Smyth, Walter Barliche, John Aubelle, John Rye, John Damalias, John Martyn, Ric. Bygge, Roger Dynnell, John Hurle, John Webbe, Will' Bodyn, and Rob' Stile; who say that William Burlond on Saturday last slew Agnes his wife with a knife worth one penny, and with the knife he smote her on the head even to the brain. And they say that he has in goods six quarters of barley, a horse worth 6s, and 18 pigs worth 16d. each. They say that (blank) son of William Herebard,

first found her. For which felony Burlond fled to St. Gile's Church on the said Monday. And the abbess of Godstow will answer for the price of the goods. Pledges of the finder, John Bayly and Thomas Lokeer. The said William abode in that church until the Wednesday next, when he confessed before the coroner that he had committed the said felony, and abjured the realm, and Southampton was assigned him for a port." *

It will be noted from the above that the record of a murder was made fairly complete. The names of jurymen were entered, also the story of the crime, the value of the felon's property, the person responsible for the safekeeping of the property, and the whereabouts of the felon. In this case, the murderer having "sought sanctuary" in the church was permitted to "abjure" or leave the kingdom by whatever port the coroner should designate. In many of these old records the carefulness of the coroner's examination is notable, exceeding, one regrets to say, most of the examinations made in these United States. For example, in unsolved murders, the circumstances of the crime are given in detail, even to careful measurements of the wound, as in a case in 1302:

". . . and he had one wound on his left shoulder with a sword; it was six inches long and two inches deep, but was not mortal; also he had another wound on his left side, which was mortal, one inch long, half-an-inch broad, and two inches deep; and the same day an inquest was held before the said coroner by the oath of William de Pussey."

As time went on the office declined not only in prestige, but in effectiveness and in the ability of its incumbents, to

* *Records of Medieval Oxford*, edited by Salter (Oxford, 1912).

such an extent that it no longer met the requirements of a changing society. Apparently by the time of Shakespeare the office was regarded so lightly that its very mention was a source of merriment. When the great Elizabethan, following dramatic proprieties, attempted in the beginning of the fifth act of the somber *Hamlet* to relieve his audience by a touch of humor, the "crowner" provided the amusement.

"First Clown: 'Here lies the water; good: if the man go to this water and drown himself, it is, will he, nill he, he goes; mark you that; but if the water come to him and drown him, he drowns not himself; argal, he that is not guilty of his own death shortens not his own life.'

"Second Clown: 'But is this the law?'

"First Clown: 'Ay, marry, is't: crowner's quest (coroner's inquest) law.'"

Over and over through the centuries that marked the decline of the coroner's office, parliament attempted to correct its evils and reëstablish it as an important factor in the governmental scheme. In a recent English work on the coroner two volumes are filled with these statutory restoratives.*

By simple adoption, and with few modifications, the coroner became part of the American judicial scheme and to this day the office has remained, but for a few exceptions, practically unchanged—a medieval anomaly in a modern setting.

In most jurisdictions the office of coroner is elective with a term of from two to four years. In a few large cities a

* Wellington, *The King's Coroner* (London, 1905).

salary is attached to the office but for the most part compensation is by fees. The income from the office is by no means so large as that which the sheriff enjoys. Only a minority of the states require that the coroner be a licensed physician and in some, while it is rather usual to elect a physician if one is available and seeks the office, it is common to elect persons without regard to their occupation. In Missouri in 1925 it was found that while the majority of the coroners were physicians a very considerable number were undertakers and of such other occupations as farmers, barbers, music dealers and candy makers.* It is probably no injustice to the incumbents of this office to say that it is not often that a physician of high standing holds the office, while, very frequently, there are physicians who seek the coronership merely because they need it to supplement a scanty income or to further some other professional objective. Few reputable physicians will seek an elective office of this kind, because its standing in the community makes it a liability rather than an asset to a practicing physician.

The office of coroner, as defined by the laws of practically all the states requires two distinct and different professional techniques. There is a judicial as well as a medical side to the duties of the office.

The judicial function of the office is performed in the inquest. In most of the states the coroner must conduct his inquest with the assistance of a jury. In practice, however, a jury is summoned only when the coroner thinks it

* See Moley, "The Sheriff and the Coroner," in the *Missouri Crime Survey*, p. 83.

necessary and desirable. In cases where a death comes to the attention of a coroner and he investigates and enquires as to the cause of the same without summoning a jury, his act is commonly called "viewing." The jury, if called, is required to make inquiry as to the cause of the death whether by natural causes, homicides or accidents and, if a homicide, who the persons and accessories were and all material substances pertaining thereto. The evidence, however, taken in a coroner's inquest ordinarily cannot be used in a trial except for purposes of impeaching the testimony of witnesses. Prosecutors very commonly complain that the coroner's inquest in the actual administration of criminal law is more of a detriment than an aid in the preparation of murder cases. Where the law requires an inquest the prosecuting officers either ignore it and do not attend or they attempt to make it as perfunctory as possible because the possibility of inquest testimony being used to impeach other testimony in a subsequent trial is a danger to the state's case which every prosecuting officer dreads.

The entire system of coroner's juries may well be questioned when we learn that, as in Chicago, "in some instances unemployed men, old and young, make a business of following deputy coroners from place to place so as to be on hand when the jury is picked," and that "juries of the type which usually serve in coroners' cases perform no useful service other than the signature of their names to the coroner's verdict." * In New York City during the

* *The Coroner and the Medical Examiner,* Bulletin of the National Research Council No. 64, pp. 41, 42.

operation of the coroner system it was the opinion of the Commissioner of Accounts that "the system of Coroners' Juries both as to law and practice makes the administration of justice in the Coroners' Courts a scandal and a farce." * But even if the coroner's work were to be done with thoroughness, the complete lack of coöperation between his office and that of the district attorney and the police which we find in most states would allow for a serious miscarriage of justice in innumerable instances. What has been said of the operation of the coroner's office in Tennessee may with equal justice be said of it in practically all states where it is in existence, "that the verdicts as is the case everywhere are jokes. In almost all cases the attorney general (prosecuting attorney) makes his own investigation for use in the trial as though the coroner's verdict did not exist." † As a legal instrument the coroner system is not only valueless but in many cases a real obstruction to effective criminal administration.

Although the judicial aspects of the coroner's office may, in certain cases, assume great importance, the medical functions of the office are its chief reason for existence. The coroner, according to the statutes of most of the states, is permitted to perform an autopsy if, in his discretion, it is needed in order to determine the exact cause of death. Usually a fee is allowed for this service, and provision is made for the employment of a physician for the purpose. The fact is, that except in large cities the coroner,

* *Report on Special Examination of the Accounts and Methods of the Office of Coroner in the City of New York,* Leonard M. Wallstein, Commissioner of Accounts (City of New York, 1915), p. 83.

† From a manuscript by C. C. Sims.

if he is a physician, performs the autopsy himself. In all except a few large cities the determination as to whether or not an autopsy shall be performed is made with great carelessness. Examination of the records of the coroner's office in the counties of the United States shows vast numbers of cases where an autopsy should have been performed and was not. A number of such instances are described in the *Missouri Survey*.* Consider also the possibility for the loss of important evidence in deaths wherein the coroner's verdicts are in terms such as the following, which were copied verbatim from the records of coroners in the state of Missouri.

"The death of this man, whose name is unknown to us, was the result of natural causes, largely brought on by his advanced age. . . ." (No autopsy.)

". . . came to his death from cause unknown to us. . . ." (No autopsy.)

"Deceased came to her death by an unavoidable accident." (No autopsy.)

"Cause of death probably Premature Birth." (An autopsy was performed in this case by a physician who evidently was ignorant of the fact that a definite test exists which would definitely determine the cause in such a case.)

"So far as I could ascertain I found She came to her death from A natur cause comenly caled hart failure and I found no cause to Suspect Eny foul play. . . ." (No autopsy.)

"I lerned the man while Under the Enfluence of Whiskey or white mule Just willfully drowned himself." (No autopsy.)

". . . the deceased came to her death by Septicaeaimia and not from any medicine given By Any Doctor." (No autopsy.)

". . . died suddenly without receiving medical attention. De-

* Op. cit., pp. 91-92.

ceased was Very fleshy and died probably from heart disease." (No autopsy.)

". . . the deceased came to her death by Natural Causes Unknown." (Autopsy.)

"We the Jury, having been duly sworn diligently to inquire and true presentment make, in what manner and by whom ————, whose dead body was found at Near his home, came to his death, after having heard the evidence and upon full inquiry concerning the facts, and a careful examination of said body, do find the deceased came to his death By Natural Causes unknown to Jury." (No autopsy.)

"We the Jurors after examining body and hearing Evedence find the decesed . . . came to his death by cause unknown to us." (No autopsy.)

". . . died suddenly while in office of Dr. J———— deceased came to office at noon and the doctor was out at time. The cause of death was from natural Causes. . . ." (No autopsy.)

". . . found dead in bed by neighbors when she did not get up following morning. . . . The Cause of Death was unknown due to natural causes . . ." (No autopsy.)

Similar examples of carelessness in the city of Cleveland are cited by Dr. Herman Adler: *

"Could be suicide or murder."

"Aunt said she complained of pneumonia, looked like narcotism."

"Believe strychnia used—viewed as suicide."

"Looks suspicious of strychnine poisoning."

"Found dead."

"Head severed from body."

"Could be assault or diabetes."

"Diabetes, tuberculosis or nervous indigestion."

"Consider it tuberculosis."

* *Criminal Justice in Cleveland*, p. 467.

"Found crushed."
"Could be diabetes or poison."
"Died suddenly after taking medicine."
"Died suddenly."
"Loss of blood."
"Shock."

The conditions that are encountered even when physicians are appointed to conduct autopsies are most unsatisfactory. The following statement is that of a St. Louis coroner's physician, Dr. R. B. H. Gradwohl, who is a pathologist of standing, familiar with the best practices in the United States and Europe.

"One would never suspect that there was anything scientific about the conduct of a legal autopsy if he were to observe this work as it is done in most coroners' offices. In most localities there is practically no provision made for the proper performance of an autopsy. We see them conducted in barns, in livery stables, in private homes, in so-called 'mortuary' rooms of hospitals and undertaking establishments, with hardly enough facilities for washing the hands of the operator, much less for accurately scrutinizing disease and abnormal conditions in all their devious and obscure manifestations. The so-called 'morgue' of the average coroner's office is too often a place of resort for the morbidly curious to peer through glass windows at unsightly cadavers. The autopsy room in the so-called morgue of the average coroner's office is a huge joke, as a rule, on the very name it bears. There is sometimes at hand an operating table and perhaps running water, but one looks in vain for a weighing machine, a photographic apparatus, a microscope, a laboratory table, bacteriologic apparatus, test tubes, slides and cover-glasses of which even the humblest hospital laboratory boasts. In short, there is absolutely no possibility of anyone, no matter how expert he may be, performing all the different

manipulations of this autopsy work in a manner satisfactory to the trained pathologist. The position of autopsy physician is seldom held by a pathologist, and, if it is, he has great difficulty in doing his work properly under the circumstances already detailed."

Perhaps some of the most sordid aspects of American politics are to be encountered in connection with the operation of the coroner's office. In one large city it was found that a large proportion of the undertaking "business" which it was possible for the coroner's office to award to its favorites had been given to an undertaking company in which the political boss of the city was heavily interested. The coroner in another large city told the author on one occasion that he was in the habit of selecting undertakers belonging to his own party, because, as he explained, the coroners belonging to the other party had in like manner favored their own party friends. An investigation conducted in the City of New York, which resulted in the abolition of the coroner's office in that city, revealed the most astonishing corruption and political favoritism.* A recent study of the coroner's office in Cook County, Illinois,† showed that while for a time the office of coroner had been conducted in an efficient and non-political manner, during the past six or eight years a distinct decline had been evident. Competent pathologists who had served for many years were summarily dismissed and new appointments were made which repre-

* *Report on Special Examination of the Accounts and Methods of the Office of Coroner, New York City,* by L. M. Wallstein, Commissioner of Accounts.

† Report on *The Medical Side of the Coroner's Office,* by Dr. Ludwig Hektoen, made for The Illinois Association for Criminal Justice.

sented a distinct loss of ability. This report lists many examples of wholly incompetent medical examinations. In connection with the political activities of the coroner of New Orleans a report of the National Research Council says: * "The present incumbent had no experience especially fitting him for the office; but he had the diploma and the license to practice, and he had the capacity for capturing the nomination by organizing a 'Polling for Coroner Club,' getting the backing of a regular party organization and thus receiving the election." Investigators agree unanimously that if the highly specialized and technical work of the coroner is to be of any value to criminal investigation, it must be relieved of the dangers of political intrigue and placed in the hands of competent persons whose appointment and tenure of office shall depend on their training and ability for their particular jobs alone.

In the prosecutions which grew out of the Hall-Mills murders of 1922, the ineptitude of the coroner's office received new emphasis. Consider the possible consequences involved in the carelessness revealed in the following testimony offered by a coroner-undertaker: †

"Direct examination by Senator Simpson:

Q.—Did you receive the body of Eleanor Mills in the County of Somerset? A.—Yes.

Q.—What time? A.—I think in the afternoon.

Q.—Who instructed you to send over for her body? A.—Mr. Mills and his daughter.

* Op. cit., p. 25.

† Quoted from the *New York Times*, November 13, 1926.

Q.—What time did the body come to your place? A.—I think it was in the afternoon of Sunday.

Q.—It was in your place, in your care as an undertaker, the remains of Eleanor Mills, on Sunday; that would be the 17th of September, 1922; is that a fact? A.—I think that is right.

Q.—Were you in the store or shop when the body came? A.—I could not say about that.

Q.—Were you there when Dr. Cronk made the examination of the body, of the wound in the abdomen, to see about her condition? A.—I don't know as I was there when he made any examination.

. . . . . .

Q.—Did you tell Dr. Cronk, as he testifies, to go and examine the body of Mrs. Mills and make an inspection of the abdomen to determine her condition? A.—No, sir.

Senator Case—One minute. I do not understand that is the testimony of Dr. Cronk.

Q.—Did you have any conversation with Dr. Cronk about the examination of the body of Eleanor Mills—not what the conversation was, did you have any conversation with him?

The Court—With Dr. Cronk?

Q.—With Dr. Cronk? A.—Why, I don't recollect any conversation.

Q.—What did you do with the body of Mr. Hall? Where did you take it from the shop? A.—We took it from there to the church.

Q.—Was it ever taken to his home? A.—No, sir.

Q.—It was taken direct from your morgue to his church on Monday. What time Monday? A.—I think it was 11 o'clock in the morning.

Q.—Then after the service it was taken out of the city to Brooklyn, wasn't it? A.—Yes, sir.

Simpson (the special prosecutor) then asked:

"And there was no autopsy on it up to the time you took it out of the morgue into the church, was there?" The reply was, "Not from my place."

"The body was in your possession all the time?"
"It was here first."
"In your place there was no autopsy?"
"No, sir; not that I know of."

. . . . . .

Q.—You were the coroner, weren't you, over in Middlesex? A.—Yes.

Q.—And you knew this had been a murder, didn't you? A.—Well, it was supposed to be so.

Q.—What did you think when you saw a woman with her throat cut and three bullet wounds in her head? A.—I supposed it was.

Q.—And you were Coroner. Did you do anything to see that there was an autopsy on this body up to the time it was buried? A.—No, sir."

Thus the bodies of the two victims of the most sensational crime of recent times were permitted to go to their places of burial. Four years later autopsies were made by experts imported from New York under the orders of the special prosecutor. It is possible that this shocking example of the inefficiency of the coroner's system had an ultimately good result, because in 1927 New Jersey adopted the medical examiner system by act of legislature.

Another serious aspect of the coroner's system appeared several years ago when it was found that coroner-physicians were also serving insurance companies. The possibilities of divided loyalties in such employment are obvious. More serious still are the cases in which coroners are also railway physicians. In one county in New York it was recently shown that four of the five coroners of one county were surgeons for a railway. The complete

breakdown of the coroner system in the United States has been obvious for a long time and numerous efforts have been made to improve it or to substitute something more effective. The outstanding example of a satisfactory substitute for the coroner's office is the Massachusetts medical examiner. In 1876, the State of Massachusetts adopted a law which created an entirely new system.*

It provides that a medical examiner and an associate medical examiner are appointed by the governor for each county, except Suffolk (Boston) where two are provided. The term is seven years and there is no limitation upon continuity of services. In practice the governor usually retains the services of the incumbent for as long as he cares to continue in office. According to the statute, medical examiners must be "able and discreet men learned in the science of medicine." In Suffolk a salary is provided, but in other counties the office is on a fee basis.

The striking feature of the Massachusetts system is the complete separation of judicial from medical functions. The medical examiner is responsible only for the latter. He is required to make an examination of dead bodies of such persons as are supposed to have died by violence or without medical attention. His report is in the form of a medical document with detailed information concerning the condition of the body and the attendant factors which are pertinent to a determination of the cause of death. If his examination leads him to the conclusion that the death was caused by act of negligence of another, he must file a report of his examination with the district attorney and a

* Mass. General Laws (1921), Chapter 38.

justice of the district court or a trial justice within the jurisdiction. When he has done this his responsibility ends and the inquest, if one is held, is conducted by a judicial officer or district attorney. Thus the law permits medical officers to perform medical work and judicial officers to perform judicial work. Perhaps the best reason for the success of this work is to be found in the personnel of the office. In Suffolk County only five men have held this office in fifty years. They were in all cases distinguished physicians and in most cases members of medical faculties. The striking success of the Massachusetts system indicates what can be done with proper distribution of responsibility coupled with a non-political administration.

The City of New York has been provided with a system largely based upon the experiences of Massachusetts. Following the sensational investigation of the coroner's office in 1914, the state legislature adopted an amendment to the charter of the City of New York, which abolished the position of coroner and replaced it by the position of medical examiner. Under this law, an experienced pathologist was appointed to the office and he has held it ever since. According to competent judges, both in the legal and medical professions, the new administration has worked admirably. It is non-political, scientific and exceedingly helpful in the solving of murder cases.*

* I have already referred to the fact that in the two counties of New York and Kings, there is provision by law for a medical assistant to the district attorney. This provision was made before the medical examiner system was created and was not abolished when the latter went into effect. The district attorneys have claimed that this medical assistant is needed, but apparently it is a mere duplication of the work of the medical examiner.

CHAPTER VI

THE TWILIGHT OF THE GRAND INQUEST

HISTORICAL evidence seems to indicate that the original purpose of the grand jury was to provide a method of initiating prosecutions by means of a group of the best men of the community. It gave the timid but well-intentioned person who had suspicions of a crime the opportunity to tell his story without danger to himself. Moreover, it permitted the consideration of a vast number of rumors, founded and unfounded, to be passed upon by a group of superior citizens. From this original high purpose the grand jury has now come to be a group of men, seldom the best men in the community and frequently far below the average, who function under the dictation of the prosecutor. It is a mere rubber stamp for the prosecutor, and a means by which he is able to escape specific responsibility for his actions. Occasional investigations are made by grand juries of public offices with apparently, according to the best evidence available, rather scanty returns. Slowly the grand jury, as an instrument for the routine work of initiating prosecutions, has been supplanted by the public prosecutor, until in half of the states a felony prosecution may be initiated by an information filed by the prosecutor without the intervention of

the grand jury at all. This slow decline in its use, and the cumbersome and ineffective work which it performs as an investigating agency, seem to have consigned a once powerful institution to relative unimportance.

Perhaps there is no better way to visualize the potentialities of the grand jury than to quote the quaint phrases of the oath commonly administered to the foreman in England. This oath is in substance duplicated in the American states:

"Sir, you, as foreman of this grand inquest for our sovereign lord the King, and the body of this county, shall diligently inquire, and true presentment make, of all such matters and things as shall be given to you in charge, or shall otherwise come to your knowledge touching this present service: the King's counsel, your fellow's and your own you shall keep secret: you shall present no one through envy, hatred or malice, neither shall you leave anyone unpresented through fear, favor, affection, gain, reward, or hope thereof, but you shall present all things truly and indifferently as they shall come to your knowledge, according to the best of your understanding, So help you God."

Juries were introduced into the law by the Carlovingian kings, imitating, it is thought, the Roman "fiscus." * A jury or "inquisitio" was summoned to "discover and present facts in answer to enquiries . . . by the king." The information required might be for the purposes of pending litigation or it might relate to the detection of crime

* We cannot do better than to follow Professor Holdsworth's account of their origin and function in his *History of English Law*, Vol. I, pp. 313-323 (Boston, 1922).

or the misconduct of officials. The institution was adopted and used by the Normans, who definitely introduced it into England.* It appeared in England at first as "a body of neighbors summoned by some public officer to give, upon oath, a true answer to some question." † The most extensive use was made of it. It was used in compiling the Domesday Book—an inquiry into the extent, value and tenure of most of the land of England. Its operations, until with the growth of centralized government in the thirteenth and fourteenth centuries they became chiefly confined to judicial functions, covered a wide realm of administrative matters. It was used in land litigation, especially in Henry II's reign, as well as to answer "enquiries" as to persons suspected of crime, as to escheats, outlaws, and the misdoings of officials, as to the doings of the sheriffs, as to property values for the purpose of assessment of taxes, and in the local and central (royal) courts. The growth of the power of the state did away with the old customary law in which redress of wrongs was left wholly to the injured party. An inquisitory procedure developed—in England, as on the continent—" 'to enquire of,' as well as to 'hear and determine' criminal causes," taking the form of presentment by a jury and indictment at the king's suit.

The grand jury, as we now know it, is directly derived from these ancient juries. Its function is to discover and

* Suggestions are also found of its origin in Anglo-Saxon institutions. Ibid., p. 313.

† Ibid., p. 312, quoting Maitland. Other authorities are: Thayer, *Preliminary Treatise on Evidence;* Pollock and Maitland, *History of English Law;* McKechnie, *Magna Carta;* Stephen, *History of Criminal Law.*

present persons accused of serious crime. Its regular use for this purpose may be said to date from the Assize of Clarendon (1166), which provided in its first clause that "for the preservation of the peace and maintenance of justice enquiries be made throughout each county and hundred by twelve legal men of the hundred and four legal men of each township, under oath to tell the truth; if in their hundred or in their township there be any man who is accused or generally suspected of being a robber or murderer or thief, or any man who is a receiver of robbers, murderers or thieves since our lord the king was king." * The use of this new piece of judicial machinery —presentment by a jury—came to be the most important function of the court known as the "sheriff's tourn," which emerged as a distinct court at the end of the thirteenth century. Presentments were required to be made "of persons suspected of many miscellaneous offences, and as to other matters affecting the maintenance of the order and good government of their district. The presentments were made to a jury of twelve free men of the hundred, who either accepted or rejected them. If they accepted them they passed on the presentments to the sheriff. He sent those accused of more serious crimes to the itinerant justices, or, if they were not in custody, directed their arrest. The lesser crimes he punished by amercement. . . ." † A sample list of things the sheriff wished to be informed about includes "purpestures, stoppage of ways, house breakers, thieves, affrays, escapes,

* Holdsworth, op. cit., p. 77.
† Ibid., p. 77.

forgers, treasure troves, breakers of the assize of bread and ale, false weights and measures, and of 'such as sleep by day and watch by night, and eat and drink well and have nothing.' " * As today, the juries could present either from their own knowledge or from the information of others. Their selection was originally from the several "hundreds," but as the courts of assize and quarter sessions took the place of the earlier courts, the juries came to be drawn from the body of the county. Twenty-four were summoned, out of which twenty-three were chosen, and the majority decided whether to "find a true bill" or "ignore" the accusations preferred.† The presentment of the grand jury, now, as always, is merely an assertion that on the evidence of the prosecution the party presented is suspected—never that he is guilty. It is the function of the trial or petit jury to pass upon the question of guilt.‡ Thus, practically by the middle of the fourteenth century the outlines of modern English criminal procedure were drawn. The normal course of procedure in a criminal case has been presentment by the grand jury, indictment, and trial by the petit jury.

The other great method of accusation, the criminal "information," has a history almost as old as that of the

* Ibid., p. 79.

† Ibid., p. 322.

‡ Historically the trial jury was evolved to fill the gap left by the abolition of the older methods of proof,—by battle, compurgation or ordeal. Though originally all or some members of the grand jury always formed part of the petit jury, the feeling against this practice grew so strong that members of the grand jury came to be eliminated from the petit or trial jury, at first in cases of trespass or felony, if the accused objected (by statute 1352), and finally altogether. Holdsworth, op. cit., pp. 323-5; Jenks, E., *Short History of English Law*, pp. 52, 332.

indictment. Its underlying idea was simply that "the king by his counsel should 'inform' his courts of some fact which had legal consequences." * Many kinds of "information" developed, the variety with which we are immediately concerned consisting either of suits by the king, filed ex officio by his attorney general, or suits nominally by the king, but exhibited at the relation of some private person or common informer, by the king's attorney, usually called the Master of the Crown Office. Though in the time of Edward I, the king could put a man on trial for treason or felony, the right to proceed by information rather than by presentment and indictment became restricted to offenses under the degree of felony; that is, to misdemeanors—probably by the close of the medieval period. Certain abuses arose that caused the legality of this method of procedure to be called into question. The ex officio information had come to be used for purely political objects, and private persons abused the power by prosecuting criminally any person who had offended them by any act which could be treated as a misdemeanor, without the sanction of a grand jury, and then abandoning the prosecution. After a group of cases in 1691 had decisively established the legality of this method, the use of frivolous information by private persons was checked by legislation requiring an express order of court in case of suits by private persons, and a recognizance for their effectual prosecution.

Throughout the history of these two methods, the sole difference between them has been the manner of initiating

* Holdsworth, op. cit., Vol. 9, p. 236 et seq.

proceedings. According to Blackstone "'The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment.'" *

We find in this country that the use of indictment and information prevailed in the colonies, for the most part, much as in England. Many of the states followed the same practice,† requiring presentment or indictment of a grand jury except for inferior offenses. Others, however, have permitted the trial of felony cases either upon indictment or information.‡ An early account of the law in Connecticut § describes the three modes of prosecution in use there: by complaint or presentment of a grand jury, by information exhibited by the attorney for the state, and by indictment. The information, just as in England, was

* Ibid., p. 245, Bl. Comm. IV, 305.

† The constitutions of the following states require prosecution to be by indictment or presentment, with certain specified exceptions, usually (1) cases of impeachment, (2) cases arising in military or naval forces when in actual service, and (3) proceedings before justices of the peace: Ala., Ark., Del., Iowa, Kentucky, Miss., N. J., North Car., Ore., Pa., South Car., Tenn., W. Va. Provisions in other states vary, some requiring prosecution by indictment or presentment for infamous crimes (Me., N. Y., Ohio, R. I.); others, for all criminal offenses except where punishment is by fine or imprisonment otherwise than in the penitentiary (Ill., Neb., Tex.); others, in all felony cases, unless otherwise provided by law (Colo., Fla., North Dak., Wyo.). Even in these states, statutes permitting prosecution of *any* offense by information, have been passed, and held not to be a denial of due process of law, within the meaning of the Federal or state constitutions; see Colo., Comp. Laws, 1921, secs. 7069, 7076, in re Dolph, 17 Colo. 35 (1891), Wyo. Comp. Stat., 1920, secs. 7425, 7431, in re Boulter, 5 Wyo. 329 (1895).

‡ Cal. Const. 1879, Art. 1, sec. 8, Mo. Const. 1875, Art. 2, sec. 12, amend. 1900; Okla. Const. 1907, Art. 2, secs. 17, 18. And see Ariz., Idaho, Ia., Mont., Nev., N. Mex., South Dak., Utah, Wash.

§ Swift, Z., *System of the Laws of the State of Connecticut* (Winham, 1796).

exhibited by the attorney for the state. He was the officer appointed by the court of common pleas to prosecute, manage, and plead in the county where he was appointed. There was "no express statute authorizing this officer to make informations for crimes, but this is fully implied in the description of their duty, for the word 'prosecute' must carry the idea, that for such purpose they may give information." * Though this was the practical construction of the law, the attorneys were not bound by oath to make informations; rather it was considered a matter of discretion. Commonly, informations were given to the superior or to the county court. Capital cases in Connecticut have never been subject to this procedure; no trial for a capital offense might take place "except on the indictment of twelve jurors, concurring." Other modes of prosecution having also been authorized, the courts, to save trouble and expense, permitted crimes to be presented by a single grand juror or on the information of an attorney of the state, except in cases of capital offenses.†

Today in twenty-four states the constitutions and statutes provide, with certain qualifications, that indictable offenses may also be prosecuted by information.‡ Inquiry reveals that in all these states, with the exception possibly

* Swift, Z., op. cit., p. 376.

† The present statutory provision in Connecticut reads: "For all crimes not punishable with death or imprisonment for life the prosecution may be by complaint or information." Gen. Stats. 1918, sec. 6608.

‡ Ariz., Cal., Colo., Conn. (except for offenses punishable by death or life imprisonment), Fla. (in certain counties), Idaho, Iowa, Kan., La., Mich., Minn. (except for offenses punishable by death or imprisonment for more than ten years), Mo., Mont., Neb., Nev., New Mex., North Dak., Okla., South Dak., Utah, Vt. (like Conn.), Wash., Wis., Wyo.

of two or three, by far the majority of prosecutions are upon information.*

The use of the information in criminal cases being clearly established in law and practice, there remains a consideration of the distinctions between procedure by indictment and by information in actual practice. It is to be noted first of all that the primary point of distinction between them is simply whether prosecution shall rest with the grand jury or the prosecuting attorney. The proceedings prior to this determination are for the most part identical in both methods when a preliminary hearing is held—comprising usually the arrest, hearing before a magistrate, and commitment or "holding over" for trial.† Thereafter, in the case of an information, the prosecutor simply files an information and proceeds to trial thereon. In the case of indictment, the calling of the grand jury, its examination and consideration of the case, and the drawing and filing of the indictment, supervene. What are the relative merits of each in operation? ‡

* Answers to questionnaires; see also *Missouri Crime Survey*, p. 119, for relative proportion of informations and indictments and Miller, R. J., "Informations or Indictments in Felony Cases," 8 *J. Am. Jud. Soc.*, p. 104, n. 6.

† Miller, R. J., op. cit., p. 105.

‡ The comments and conclusions drawn in this chapter concerning the grand jury are derived in part from my personal experience as foreman of the grand jury in the city of Cleveland. The session continued five days a week over a period of three months. There is no reason to believe that the character of business transacted was unusual. There was only one investigation which did not fall within the normal routine of criminal cases brought from the municipal court or from the justices of the peace of the non-urban sections of the county, and that lasted only a week. The rest of the time was devoted to a grist of the usual felony cases, murder, burglary, robbery and rape. Eight hundred indictments were returned and seventy cases were "no billed." It was, in fact, a characteristic and normal term of work.

It is probable that the information costs less in both money and time.* This is especially so in cases where the defendant pleads guilty and is desirous of immediate execution of sentence. To wait in such cases until the calling of the grand jury is apt to make the offender change his mind about pleading guilty, thus putting the state to the trouble and expense of proving the case against him. Delay also brings in its wake the usual train of difficulties: the scattering of witnesses, the expense of maintaining the accused in jail unless he is released on bail, and the expense of jurymen, and other officials. In New York County, for instance, where a grand jury is always in session, let us assume that the defendant pleads guilty in the magistrate's court, and waives examination. He is automatically held for the grand jury. It may take from three days to a week to get the case in to the grand jury, and upon indictment and arraignment the defendant pleads "not guilty." Meanwhile in a large number of cases the complaining witnesses have gone away, and if the defendant cannot be convicted without them, he must be discharged, if he is in prison, or his bail discharged, if he is out on bail. Or when the delay is long, an important witness may have died, or disappeared, or left the jurisdiction to avoid having to help the prosecution—and this often at the

* The last grand jury summoned in one of the less populated counties of Wyoming is said to have cost $12,000. Letter from Chas. H. Kinnane, Dean, University of Wyoming, Nov. 14, 1927. Hennepin County in Minnesota spent a total of $6,966.60 in 1921 on the grand jury: $4,244.70 in fees for grand jurors and $2,731.90 on witnesses appearing before them. Thompson, P. J., "Shall the Grand Jury be Dispensed With?" 6 *Minn. L. R.* 616 (1922). The probable cost to the various counties in Texas has been estimated at from $100,000 to $200,000 a year. Atkinson, N. A., "Useless Grand Jury," 15 *Law Notes* 109.

solicitation of the defendant.* It is estimated that twenty per cent of the cases have to be disposed of (dropped) at this stage for lack of witnesses. It would be much simpler if the prosecuting attorney could immediately file his information against the defendant, upon a plea of guilty before the magistrate, and have the case immediately disposed of by the court.†

Another objection commonly urged is that the grand jury hearing duplicates the preliminary hearing. "Here is a crook before me, a professional criminal. He gets a hearing which amounts to a trial. He is indicted by the Grand Jury. His lawyer goes down before some Judge in the General Sessions and all of the minutes and proceedings and evidence taken before the Grand Jury are then reviewed. If the indictment stands afterwards, he gets another trial. That means he has three trials. Of course, the inquiry made by the Grand Jury in a criminal case is not as you say a formal trial, but as I point out it really amounts to a trial for the defendant under the Code as it exists at present."‡ What happens in a preliminary examination is briefly this. When one is complained against, under the laws of the state, he is taken before what we may call a committing magistrate. The committing magistrate holds what is called a preliminary exami-

* The problem becomes very vital in certain American cities where intimidation is commonly practiced by criminal gangs. See Chap. I.

† Banton, J. H., "What Lawyers Can Do to Increase Efficiency in the Administration of the Criminal Laws," address before the Association of the Bar of the City of New York, published in *Lectures on Legal Topics,* 1922-1923 (New York, 1928).

‡ By Hon. Wm. McAdoo, Chief City Magistrate, in *The Panel,* Monthly Bulletin of the Ass'n of Grand Jurors, N. Y. County, v. 4, no. 8, pp. 3, 4.

nation, where the state is required to prove that a public offense has been committed and there is reasonable or probable cause to believe that the accused has committed it. At this preliminary examination the defendant may waive the right to introduce any evidence. If the court finds that a public offense has been committed and there is reasonable or probable cause to believe that the accused has committed it, he is held to answer in the trial court. Subsequently he is prosecuted under an information or an indictment.* Twenty states † by constitutional or statutory provision, require a preliminary examination to be either had or waived before an information may be filed. In eight of these ‡ it is required only in cases of felony. In ten,§ no information for any offense may be filed without a preliminary examination. In seven ¶ states no preliminary examination is required. Even in states not providing for the use of the information, a preliminary examination is often held, though not required, in felony cases.** Thus the ex parte examination before the grand jury becomes a useless repetition.†† One comes to be im-

* For statutory outline of proceedings, see N. Y. C. Cr. Pro., secs. 188-214; Cal. Penal Code, secs. 858-877.

† Ariz., Cal., Del., Ida., Mont., New Mex., Okla., Utah, Mo., Nev., South Dak., Colo., Neb., N. Y., North Dak., Wis., Wyo., Mich., Kan., Minn. Several of these made an exception of fugitives from justice.

‡ Ariz., Cal., Kan., Mo., New Mex., Okla., Utah, Wyo.

§ Colo., Ida., Mich., Minn., Mont., Neb., Nev., North Dak., South Dak., Wis.

¶ Conn., Fla., Ind., Iowa, La., Vt., Wash.

** See Grand Jury Reform, 4 *J. Am. Jud. Soc.* 80; *Criminal Justice in Cleveland,* p. 175; *Report Crimes Survey Committee,* Law Ass'n Philadelphia, 1926, pp. 168 et seq.

†† "Having both the magistrate's examination and a Grand Jury inquiry as the usual prerequisites to a trial before the petit jury, involves a duplication which in the common run of cases means an unnecessary cog in our

pressed with the injustice of dragging witnesses before the grand jury for an exhaustive hearing of evidence which has already been presented at the preliminary hearing and which in case of indictment will be presented again in court. Police officers spend their time uselessly. In most cases little evidence is brought before the grand jury which could not as easily be presented in a preliminary hearing. It will be argued, of course, that this is possible, but the answer is that in a vast majority of the cases the consideration of the evidence by the grand jury has no use or purpose at all. The evidence there presented is practically all voluntarily given and would be just as freely given to the prosecutor himself without legal compulsion. The very fact that so many grand juries carry on their work year after year, indicting hundreds of persons not only without a stenographic record of their proceedings but with nothing recorded at all except, perhaps, the rough notes of the prosecutor in charge, reinforces the conclusion that nearly all of their hearings are unnecessary repetitions of evidence that is really common property already.

On the other hand: "The advantage of the preliminary hearing to the accused is manifest. It necessarily discloses to him much of the case of the prosecution and thus assists him in preparation of his defense." (That this is sometimes considered a disadvantage by the prosecutors will be noted later.) "It thus appears that two agencies originally used to assist the prosecution have been converted

cumbersome judicial machinery." W. Bruce Cobb, former City Magistrate, N. Y. C., in *The Panel,* Monthly Bulletin of the Ass'n of Grand Jurors, N. Y. County, Vol. 4, No. 8, p. 4.

into agencies for protecting the accused. The Grand Jury, whose original function was to pursue the suspect by presentment, has been converted into an agency to check the power of the committing magistrate, and the magistrate was clothed with inquisitorial power only to have it converted into the judicial power exercised at the modern preliminary hearing. . . .

"Assuming the hearing properly held by an honorable and competent committing magistrate, it affords a much more effective protection to the accused than was ever afforded by the proceeding before the Grand Jury. At the preliminary hearing the accused is given the opportunity of not only facing the witnesses for the prosecution but of cross-examining them; of making whatever explanatory statements he may care to make, and finally, of having the sufficiency of the evidence against him to make a prima facie case determined by a public officer whose special training ought to fit him for the performance of the duty."*

The power placed within the reach of the average grand juryman is often abused. Absurd and sometimes shocking irrelevancies are pried into. On one occasion a bootlegger witness was requested by a juror to produce the names of his customers for no purpose except to provide spicy material for gossip. Impertinent and unnecessary questions are often directed to witnesses in sex cases, in which facts are sought that do not bear upon the question of indicting at all. The average grand juror is, in fact,

* *Report Crime Survey Committee,* Law Ass'n Philadelphia, 1926, pp. 175, 182.

unable either to direct his questions to genuine relevancies or to form a definite judgment as to the value of the evidence presented. Grand jurors need constantly to be warned that they are not conducting a trial. They attempt to exercise all sorts of improper influence. They frequently forget that their purpose is to weigh the value of evidence only; and instead they attempt to exercise the functions of judge, jury and parole board all in one.

In some places there is justification for the following comment by a former prosecutor in a Texas county:

"As to what goes on behind the closed doors of the rural grand jury I may not enlighten you with authentic details, lest I be subjected to the pains and penalties visited upon those who divulge state secrets. . . . Here the established rules of evidence have no standing whatever. Even the common principles of good sportsmanship and fair play are unrecognized and may be invoked in vain. Every kind of pressure is brought to bear on the witness.

"I have seen weak-minded women and frightened children browbeaten and terrorized for hours by the persistent nagging of the twelve good men and true. . . . I have seen terrified little boys reduced to hysteria by awful threats of lifelong imprisonment. I have heard wives and daughters fervently preached at and prayed with in an effort to inveigle them into betraying their husbands or fathers. Time after time, I have known a grand jury to hale before it, ostensibly on another matter, one against whom it contemplated an indictment, and trick him into furnishing the evidence against himself." *

In this connection it is sometimes contended that the ex parte hearing before the grand jury protects the prose-

* Keeble, H. R., "The Grand Inquest of the County," *The American Mercury*, p. 146 (1925).

cution from revealing the nature of its evidence to the defense. But it is doubtful whether the defendant does not know about it in any case. For instance, "As it is here in New York and in the rest of the country they might as well sit out in the public squares. There is no secrecy about the proceedings, and worse than all, now every crook in New York can have the minutes inspected . . ." *

Under the English practice,† all the evidence in the possession of the Crown is at the disposal of the counsel for the defense; he has all the evidence that can be presented at the trial, before the trial begins. Yet it is never claimed that this works as a disadvantage to the prosecution in proving its case.

Moreover, "It is not necessary for a prosecuting attorney to reveal all of his evidence at a preliminary hearing; in fact, all that he is required to do is to make a prima facie case, and he can hold back any evidence which good generalship seems to require. It is doubtful if the state reveals its case as much in a preliminary hearing where it is required to show only that 'There is probable cause to believe the prisoner to be guilty,' as it does in a grand jury hearing where it is required to prove its case to the same degree of certainty as would be required to convince a trial jury of the guilt of the defendant." ‡ It may

* Wm. McAdoo, Chief City Magistrate, N. Y. C., in *The Panel,* Monthly Bulletin of the Ass'n of Grand Jurors, New York County, Vol. 4, No. 8, p. 3.

† Whitman, C. S., "The Administration of the Criminal Law," an address before the Association of the Bar of the City of New York, published in *Lectures on Legal Topics,* 1923-1924 (New York, 1928), p. 421.

‡ Miller, R. J., "Information or Indictments in Felony Cases," 8 *J. Am. Jud. Soc.* 108.

be pointed out that in the rare cases where secrecy is desired for this reason, the grand jury may always be used.

Another substantial advantage claimed for the grand jury is that it acts as an excellent buffer between the public and the prosecuting attorney. This overlooks the fact of the predominating part played by the prosecuting attorney before the grand jury.* Unless a grand jury is provided with unusual experience and competence in its membership, the prosecutor becomes absolute master of its decisions. It is easy to understand the substantial truth in the average prosecutor's comment that "I shall indict," or, "I shall not indict." In a process which usually depends entirely on matters of legal definition, the sole legal adviser of the civilian grand jury is able to have his way in nearly every case. While the jury may consider that it is acting independently, it is usually following the will of the prosecutor, which is subtly impressed upon it. Even when the jury itself contains sufficient leadership to control the prosecutor, there is a feeling on the part of those who bring this unusual situation about, that their triumph is shortlived, because the prosecutor will accomplish his purpose by means of a subsequent nolle prosequi, or some other method of disposing of the case. It becomes increasingly apparent to a grand jury that its function is merely to provide a means by which the prosecutor may, while exercising his own discretion and enforcing his own

*N. Y. C. Cr. Pro. Sec. 263: "Whenever required by the grand jury, it shall be the duty of the district attorney of the county to attend them for the purpose of examining witnesses in their presence, or of giving them advice upon any legal matter, and of issuing subpoenas or other process for witnesses."

will, escape responsibility. Actually, abuse of this power is substantially checked by the holding of a preliminary examination in which a magistrate has already determined that there is probable cause to believe the accused guilty —a check not operating where prosecution is based solely on the hearing before the grand jury. In addition, there are the various laws providing for the removal of the prosecutor from office in case of malfeasance, and for his displacement by the state's attorney general or for the appointment of a special prosecuting attorney by the court, in the case of nonfeasance. As a matter of fact, the occurrence of such instances is exceedingly rare.

The average grand jury personnel is, of course, not always free from political influences and at times is undoubtedly swayed by sentiment. It is true, of course, that in many instances not only the foreman, but the membership also, is drawn from the ranks of a rather competent section of the community. There is, often, probably less competence in the average grand jury than in the average petit jury. In some jurisdictions the selection of the petit jury depends very largely upon a perfectly fair and exact system of drawing names from the citizenry of the county. The grand jury, on the other hand, is practically appointed, and unquestionably many political favors are paid by such appointments. A foreman is in many instances selected without regard to the panel. Sometimes this foreman is a person of substance and standing in the community and is appointed by the judge to lend distinction and to provide the leadership necessary to the work of the office. In other instances the fore-

man is named to further the political interests of the judge or the machine. Again, he is just a member of the jury panel selected because he is of more promising material than the others.

It is commonly recognized that modern conditions have rendered obsolete the investigatory and accusatory powers of the grand jury. The modern system of police cares for the former, and the information has proved adequate and more expedient generally for the latter function. It may be conceded, nevertheless, that the existence of the grand jury as an inquisitorial body may have a wholesome effect upon the community. Its broad power to summon witnesses whose testimony is not confined to a narrow definition of the issues involved,* as in the case of a court inquiry, makes it of inestimable value where a state of public corruption exists and widespread inquiry seems desirable. In those states where the grand jury is occasionally called, its proceedings are usually confined to such purposes. Inquiry in Wisconsin reveals that "the grand jury is resorted to only in cases of widespread violation of law which involve in one way or another a large number of people." † An instance is cited also in Wisconsin when a grand jury was summoned which returned over a hundred indictments for offenses having to do with the handling of public funds. In Nebraska,‡ in Lancaster County during the past twenty-five years only six grand juries were summoned, and for the purpose of

* Carroll v. U. S. (1927), 16 Fed. Rep. 2d Ser. 951,953.

† Letter from Marvin B. Rosenberry, office of the Chief Justice of the Supreme Court of Wisconsin, Nov. 15, 1927.

‡ Letter from Henry H. Foster, Dean, Univ. of Nebraska, Nov. 19, 1927.

investigating the corruption of county officials, corrupt practices of members of the bar, and illegal banking and sales of stock. It is stated:* "It is not the practice in this state to call a grand jury unless the judge or judges of a district should be of the opinion that the county attorney was not doing his duty or that the criminal atmosphere might be cleared or abuses reached in a way that might not be accomplished by the action of the county attorney alone." Of the seven grand juries called in Muscogee County, Oklahoma, since that state was admitted in 1907, each time it has been for the purpose, primarily, of investigating alleged misconduct of county officials. Once a grand jury was called to investigate a bank failure in the county.† A similar experience is related for Oklahoma County.‡ In a California county § indictments are practically limited to cases of conspiracy where there are a large number of defendants and many offenses, or where such action will expedite extradition proceedings, or cases where for some reason or other secrecy is desirable.¶

It is not suggested that the grand jury is necessarily the ideal organ for investigating purposes. But it seems the

* Letter from Chas. A. Goss, Chief Justice of the Supreme Court of Nebraska, Nov. 14, 1927.

† Letter from Fred P. Branson, Chief Justice of the Supreme Court of Oklahoma, Nov. 25, 1927.

‡ Letter from Julien C. Monnet, Dean, Univ. of Oklahoma.

§ Letter from Earl Warren, District Attorney, Oakland, Cal., Dec. 13, 1927.

¶ "It is also an objection that sixteen to twenty-three business men must sit day after day and give up their valuable time in hearing the evidence to decide whether a common burglar or thief should go on trial." "The Grand Jury System in the County of New York," in *The Panel,* Monthly Bulletin of the Ass'n of Grand Jurors, N. Y. County, Vol. 5, No. 7, p. 4. District Attorney Banton of New York County estimates that out of 6,000 cases presented to the grand jury, 4,000 are a waste of man-power. 1927 *Report of the Crime Commission of N. Y. State,* p. 58.

most available one at the moment. Michigan, which has rarely called the grand jury through the last seventy years, has an interesting substitute in the so-called "one man grand jury." By statute of 1917,* whenever, upon any complaint being filed upon information or belief, any justice of the peace, police judge or judge of a court of record has reasonable cause to suspect the commission of any crime, offense, misdemeanor or violation of any city ordinance, he may in his discretion—or must, upon application of the prosecuting attorney or city attorney—require any person to attend before him as a witness and testify concerning any violation of law about which he may be questioned. If the justice or judge is then satisfied that an offense has been committed and that there is probable cause to suspect any person or persons, he may cause their apprehension, and thereafter proceed with the case just as upon formal complaint. In case of an offense by a public officer, the findings of such judge or justice are served upon the officer or board having jurisdiction to conduct removal proceedings, and constitute a sufficient complaint for the removal of such officer. The same law governs as to the divulging of statements made by a witness in the course of such inquiry, as in the case of grand jurors. This system has been effectively used in a number of instances† in Michigan, since it came into operation. These include an investigation into an alleged conspiracy in restraint of trade among commission merchants resulting in the conviction of four commission mer-

*Mich. Comp. Laws (Cahill, Supp. 1922) Sec. 15664 (1)-(4).

†Marsh, Judge P. W., "Michigan's One Man Grand Jury," 8 *J. Am. Jud. Soc.* 121.

chants out of seventeen indicted; an investigation into the "House of David" colony at Benton Harbor; an investigation of bail bond frauds in the Detroit City Criminal Court, which resulted in five indictments being returned and the conviction of one of the defendants by verdict and the remainder by plea; and an investigation into alleged fraud in the delivery of city supplies.

CHAPTER VII

THE VANISHING TRIAL JURY*

IN the year 1926 a total of 13,117 felony prosecutions entered preliminary hearing in Cook County, Illinois. Only 492 of these actually resulted in a completed jury trial, of which 283 resulted in acquittals, and 184 in convictions of the offense charged, while twenty-five were convicted of a lesser offense. Thus more than ninety-six per cent of the cases initiated in this great jurisdiction were disposed of through the exercise of the discretion of some agency other than the jury. The data for other great cities of the country show somewhat similar proportions. Numerically, therefore, the part played by the petit jury in the administration of justice is very small. And although it is true that from the standpoint of public interest the cases which reach a jury are often striking and well known, their actual importance as a group is overshadowed by the great mass of cases disposed of by the prosecutor, the preliminary magistrate, and the judge, acting without a jury and usually through some sort of a compromise. It is not an over-statement to point out that the practical application of criminal law is, in substance if not in form, as truly a process of administration as are such routine governmental functions as the collection of

* This chapter appeared in the *Southern California Law Review* for December, 1928.

taxes, the conservation of public health, the building of public works, or the management of police departments.

First to be considered is the process of terminating prosecutions and releasing defendants in ways other than through acquittal by a jury. Dean Justin Miller in an informing article has indicated the extent and importance of justice through compromise.*

"Cases in practice are compromised by the injured persons, the police, bail bond brokers, the magistrate, the trial judge and, most important of all, by the prosecutor. The latter may 'move for a dismissal' at the preliminary hearing; he may promise immunity to the accused in consideration for his turning 'state's evidence'; he may move for a dismissal or enter a nolle prosequi in the trial court; he may agree to dismiss a number of pending charges if the accused will plead guilty to one; he may agree to dismiss the original accusation if the defendant will plead guilty to a lesser degree of the same offense; he may consent to continuances and let the case drop out of sight without formal disposition." †

While the forms in which the law permits the termination of cases are numerous and the reasons for these adjustments are legion, the most important in practice is the nolle prosequi. ‡ Historical evidence indicates clearly that the nolle prosequi was intended to be used only in the most unusual cases and then to prevent grave injustice.

* "The Compromise of Criminal Cases," 1 *Southern California Law Review* 1.

† Ibid., p. 6.

‡ A nolle prosequi is in criminal actions "a formal entry upon the record, by the prosecuting officer . . . by which he declares that he 'will no further prosecute' the case, either as to some of the counts, or some of the defendants, or altogether." *Black's Law Dictionary*. If entered after the jury is sworn it amounts to an acquittal. W. L. Clark, *Criminal Procedure* (2nd Edition, 1918), pp. 154, 443.

It was restricted to the Attorney General of England, who was and is a most important official in the judicial system of the Kingdom. An incident in the life of Chief Justice Holt illustrates this. It seems that "one Atkins having been committed for trial for seditious language, an associate of Atkins namel Lacy appeared at the house of Chief Justice Holt and asked to see the great judge. The servant pleaded the ill health of his master and refused to admit Lacy, who then said in a very solemn tone, 'Acquaint your master that I must see him, for I bring him a message from the Lord God.'

"This impressive message moved the Chief Justice to admit the visitor, who thus addressed his host:

" 'I have come to you a prophet from the Lord God, who has sent me to thee, and would have thee grant a nolle prosequi for John Atkins, his servant.'

" 'Thou art a false prophet and a lying knave,' answered the Chief Justice, 'If the Lord God had sent thee, it would have been to the Attorney General, for He knows that it belongeth not to the Chief Justice to grant a nolle prosequi. But I, as Chief Justice, can grant a warrant to commit thee to bear him company in prison.' "

The Judge's directions were followed and both the prophet and his friend were convicted and punished.*

The extreme decentralization of the administration of criminal justice in the United States threw this power into the hands of every county prosecutor.† In spite of

* Campbell, *Lives of the Chief Justices,* V. 5, p. 59.

† For statements of the law on this point see, as to the common law practice, Lizotte v. Dloska, 200 Mass. 327 (1909); Commonwealth v. Tuck, 20 Pick. 356 (1837); Commonwealth v. Wheeler, 2 Mass. 122 (1806);

every evidence in the law that the nolle prosequi was legally intended to be exercised only in unusual cases, it is, in fact, used with the utmost freedom. In Cleveland in 1925 more than eleven per cent of all prosecutions initiated by indictment were terminated by the nolle prosequi. In St. Louis in 1923-1924, 10.2 per cent were thus terminated. In Hennepin County, Minnesota (Minneapolis) in 1923, 28.61 were so terminated, while in Fulton County (Atlanta) Georgia, the number was 13.07. According to recent figures assembled in Illinois, the percentage of cases initiated by indictment in Cook County which are terminated by a nolle prosequi amounts to more than twenty-five per cent of the cases entering the trial court.*

The extensive use of the nolle prosequi has often been attended by serious evils. Attention is called to it in a Rhode Island case where it is said: "We are aware that the custom has obtained to a considerable extent for the Attorney General to compromise or settle this class of cases, as well as cases arising under the liquor law, upon the payment of a certain sum of money to the State by the defendant; but the practice is a vicious one and meets with our entire disapproval. There is no law authorizing a sentence or any legal substitute therefor by consent of

Rogers v. Hill, 22 R. I. 496 (1901); also 35 L. R. A. 701, n. As to other jurisdictions: Denham v. Robinson, 72 W. Va. 243, 45 L. R. A. N. S. 1123 (1912); People v. Newcomer, 284 Ill. 315 (1918); Butler v. Moise, 48 La. Ann. 109, 35 L. R. A. 701 (1896).

* See *Cleveland Association for Criminal Justice*, 4th Quarterly Bulletin, Dec. 31, 1925, Table No. 4, p. 6; *The Missouri Crime Survey*, p. 285, Table IV; *Minnesota Biennial Report of the Attorney General*, 1926; "Crime and the Georgia Courts," *J. Cr. L.*, V. 16, p. 168.

parties, without the imposition thereof by the court." * A similar practice is said to have existed in Maine.† The Cleveland Survey reports the practice of a "blanket nolle" by which a large number of cases were from time to time brought to the court by the prosecuting attorney and by a single sweep of authority stricken from the docket. In 1920 such a "blanket nolle" was requested for no less than 400 cases.

The Los Angeles Crime Commission, in 1924, concluded that the practice of entering nolle prosequis had reached a wholly unwarranted extent and made strenuous efforts to curb it. The Georgia Survey, already referred to, criticizes severely the free use of the power in the courts of that state. Probably as a result of the danger of abuses, many states have adopted restrictions upon the use of the nolle prosequi by prosecutors. These limitations, which are in some cases statutory, in others imposed by custom, usually have required the consent of the court. In Ohio the statutes require that the prosecutor "shall not enter a nolle prosequi without leave of the court, or good cause shown in open court." ‡ In Pennsylvania the written consent of the court is required; in several other states written reasons must be given by the prosecutor; while in others strict penalties are provided for the entering of a nolle prosequi in pursuance of a corrupt agreement. In New York the entry has been abolished by act of the legislature.§

* State v. Conway, 20 R. I., 270 (1897).
† See 6 *Maine Law Rev.* 199.
‡ General Code, Sec. 2919.
§ See N. Y. C. Cr. Proc. Sec. 672; also in Calif., Pen. C. Sec. 1386.

Requiring the consent of the court is likely to become a mere formality except in unusual cases. It is difficult for a judge to review the reasons for a nolle prosequi when any considerable number are requested. His facilities for independent investigation are so limited that he is almost compelled to accept the findings of the prosecutor, and in actual practice he usually does. In New York, where the formal nolle prosequi is abolished, the court may "upon the application of the district attorney, and in furtherance of justice, order an action, after indictment, to be dismissed." * This provision was a substitute for the abolished nolle prosequi, but was intended, according to the Court of Appeals, to be "seldom exercised."† Whatever the intention, the practice is otherwise. In the state of New York in 1925, 11.4 percent of felony cases were dismissed either on motion of the district attorney (2.60 per cent) or on motion of the defendant's counsel (8.85 per cent). The latter group include, of course, a large number of cases which the district attorney does not contest. The proportion thus dismissed is approximately the same as the proportion of nolle prosequis in other states. The practice continues in effect, although the name is gone.

The justifiable uses of the nolle prosequi are of course numerous. For example, when a defendant is convicted on another more serious charge, or in another jurisdiction, or dies, it furnishes a means of clearing the docket of a case which otherwise might for many years remain pend-

* Sec. 671 of the Code of Criminal Procedure.

† People v. Willis (1898), 23 Misc. 568, 52 N. Y. Supp. 808; People v. Montgomery (1901), 36 Misc. 326, 73 N. Y. Supp. 535.

ing. Mistakes are made by grand juries in regard to identity or in connection with other matters of evidence. Circumstances sometimes wholly alter the "probable cause" upon which a prosecution was initiated. Everywhere, however, there are other means of meeting such situations as these. The power of the court to terminate groundless prosecutions is very large. Cases may be terminated by dismissing or "quashing" indictments and if the jury is already empanelled, a verdict for the defence may be "directed" by the judge.

The abuses of the nolle prosequi, with resultant criticism, accompanied by statutory and other methods of control, have during the past few years apparently resulted in increasing hesitation on the part of prosecutors to use it. They realize, and the newspapers and the public are coming to realize, that a nolle prosequi becomes a matter of official record which fixes definite responsibility upon the prosecuting attorney who enters it. In those jurisdictions where there has been much criticism of the prosecutor there is a definite decline in nolle prosequis. This is strikingly shown in Cleveland, where in 1921 the Survey rather severely criticized its free use. As a result and probably also because of the existence of a vigilant private organization which has followed the fate of cases, the prosecuting officer has shown much more reluctance to enter a nolle prosequi. This tendency toward a decline in its use over a period of years is shown in the following table: *

* This table is based upon the reports of the Cleveland Association for Criminal Justice. See *Fourth Quarterly Bulletin* for quarter ended Dec. 31, 1927, page 2.

THE NOLLE PROSEQUI IN CLEVELAND

Year	Total Indictments	Cases "Nolled"	Per cent "Nolled"
1922	1480	204	13.8
1923	1544	278	18.0
1924	1083	108	10.0
1925	1110	126	11.4
1926	1127	77	6.8
1927	1293	78	6.0

A similar decline is notable in the dispositions in the Municipal Court of Chicago. In eighteen years the proportion of nolle prosequis has declined from approximately twenty per cent to four per cent of all felony cases before the court.

Adequate records are not available to indicate that there has been a widespread tendency to discard the entering of a nolle prosequi in favor of other methods of exercising leniency. It may be ventured, however, that the tendency in Cleveland and Chicago is not unusual. It is probable that the exercise of discretion by the prosecutor has more recently taken the form of bargaining for pleas of guilty. This practice has become so common that it deserves serious study.

The elementary fact should be stated at the outset that after the charge, either through information or indictment, in a court of proper jurisdiction, the defendant is permitted to make reply. This reply takes the form of a plea. With the exception of a few minor forms of pleading the pleas commonly offered are of "guilty" and "not guilty." If the plea be guilty there is no trial and the judge proceeds to fix sentence according to the provisions of the law. The plea of "not guilty" entitles the defendant to a

trial, usually by jury, although there are, as we shall see presently, jurisdictions in the United States where a plea of "not guilty" may be offered with an additional consent to be tried by the judge without a jury. The point that the layman sometimes misses in connection with the plea of guilty is the fact that such a plea is not the outcome of a despairing realization that there is no use in resisting the power of the law, nor is it an abject gesture of confession and renunciation. In the practice of American criminal courts it has become a definite type of defence strategy. It usually follows discussion between the counsel for the defence and the prosecuting attorney, in which either implied or expressed conditions are imposed by the defence in return for a willingness to plead guilty. There are various ways in which the defendant may be rewarded for pleading guilty. There may be given the express or implied assurance of a light sentence by the judge, he may receive probation or a suspended sentence, he may receive the assurance of subsequent support by the prosecuting attorney for a parole or pardon, and, what is much more significant, he may be permitted to plead guilty to a crime other than the one with which he is charged. The defence thus receives something of value in return for its plea of guilty.

Equally important is the advantage to the prosecuting attorney. He is not compelled to carry through an onerous and protracted trial. He does not run the risk of losing his case in the court. He runs no risk of having to oppose an appeal to a higher court in case he wins in the trial. In addition the judge escapes the danger of being re-

versed on some point of law. Most important of all to the prosecutor is the fact that in such records as most prosecutors make of their work, a plea of guilty of any sort is counted as a conviction. When he goes before the voters for reelection he can talk in big figures about the number of convictions secured. In reality these "convictions" include all sorts of compromises. The district attorney's "record," as he usually interprets it to the public, rests upon the ratio of convictions to acquittals. It means to him what a batting average means to a baseball player.

The extent to which this actual although not formal misrepresentation of records is practiced is indicated by the fact that in practically every state where there are any records at all, the convictions upon plea are lumped with convictions by jury. Such records of the work of courts are almost wholly worthless, for a conviction upon plea usually means an entirely different thing from a conviction by jury. This misrepresentation probably explains why so little public attention has been given to this important and critical factor in criminal law administration. Apparently it is only because certain states, such as New York, Illinois and Missouri, have at great expense penetrated the court records and disclosed these facts that we are at the present time in possession of enough information to begin to throw light upon the actual way in which our criminal law is being administered.

Beyond the attorney general's reports in two or three of the states, there is practically no official record of the extent to which pleas of guilty have come to characterize modern criminal justice. Even some of the earlier surveys

of criminal justice failed to take account of them and only two or three of the present crime commissions have made an attempt to separate convictions on plea from convictions by jury. We have been able, however, partly from survey reports, partly from public records, and largely by personal visits and inspection of the court records, to determine with a fair degree of accuracy the relative number of pleas of guilty and of verdicts of guilty which are offered in many of the larger urban jurisdictions of the United States and in a few rural districts. These figures are not for the same year. In every case the most recent available year's records were sought. In addition, we have in a few instances compiled the figures for a series of years in single jurisdictions in order to determine whether the plea of guilty has been more frequent or less frequent in recent years. In the data here shown "pleas of guilty" include both pleas of guilty of the offense charged in the indictment and pleas of guilty of a lesser offense. The question of pleas to a lesser offense will be considered presently as a separate and much more serious problem.

The table on the next page shows the proportion of pleas of guilty and of verdicts of guilty in a considerable number of the large cities of the United States. In all cases "verdicts" are jury verdicts. We have not included here cities in those states which permit trial by the judge alone, reserving that question for separate consideration.

The tendency to plead guilty which is so pronounced in the cities enumerated in this table is not a condition peculiar to large urban communities. It is just as evident in rural counties. We have assembled the following avail-

PLEAS AND VERDICTS OF GUILTY IN FELONY CASES *

Cities	Year	Pleas of Guilty		Verdicts of Guilty	
		No.	%	No.	%
New York City	1925	3508	88	496	12
Chicago	1926	1142	85	200	15
Detroit	1926	1584	78	437	22
Cleveland	1927	888	86	145	14
St. Louis	1923–24	....	84	...	16
Pittsburgh	1927	239	74	82	26
Los Angeles	1924–26	2366	81	538	19
Buffalo	1925	226	80	56	20
San Francisco	1924-25	346	33	710	67
Cincinnati	1925	165	59	112	41
Minneapolis	1925	608	90	71	10
Kansas City	1923–24	....	73	...	27
Rochester	1925	115	77	34	23
Denver	1926	247	76	71	24
St. Paul	1925	361	95	19	5
Oakland	1924	411	75	135	25
Atlanta	1921	299	47	341	53
Omaha	1926	245	91	25	9
Syracuse	1925	120	95	6	5
Dallas	1927	95	70	41	30
Scranton	1927	334	78	96	22
Des Moines	....	116	79	31	21
Albany	1925	90	77	28	23
Yonkers	1925	30	91	3	9

* In this table the figures include all of the cases for the entire year or years indicated except for St. Louis and Kansas City, which cover the year from October 1, 1923, to September 30, 1924. The figures in most of the instances here cited are for the entire county in which the indicated city is located. In several instances, such as Los Angeles, St. Louis, and San Francisco the county and city are the same. New York City includes five counties. In other cases the county being the prosecuting unit is the basis for the figures but because the great majority of the cases are from the city and the entire county is the real urban unit we have indulged ourselves in the inaccuracy of using the better known name of the city rather than the name of the county. For the five New York cities other than the metropolis the figures are for the city alone. The sources of these data are as follows: All the figures for New York are from the *Report of the New York Crime Commission of 1927;* for Chicago, the Survey of the Illinois Association for Criminal Justice; for Cleveland, the reports of the Cleveland Association for Criminal Justice; for Missouri, the *Missouri Crime Survey;* for the cities of California and Minnesota, from the Attorney General's Reports, and for Atlanta from the Georgia Survey. I managed to gather the data for the other cities either by copying the records myself or from someone working under my direction;

able data giving the proportion of pleas of guilty in a number of characteristic non-urban counties.

PLEAS AND VERDICTS OF GUILTY IN RURAL DISTRICTS

Counties	Year	Pleas of Guilty No.	Pleas of Guilty %	Verdicts of Guilty No.	Verdicts of Guilty %
New York					
Upstate rural	1925	522	91	53	9
California					
25 smaller counties..	1924–26	1942	79	510	21
Minnesota					
25 smaller counties..	1926	721	85	132	15
Illinois					
7 partially urban 2 strictly rural counties	1926	208	82	45	18
Georgia					
4 counties	1921	208	58	148	42

Thus it appears that the plea of guilty is much more frequent than a verdict of guilty in city and country alike

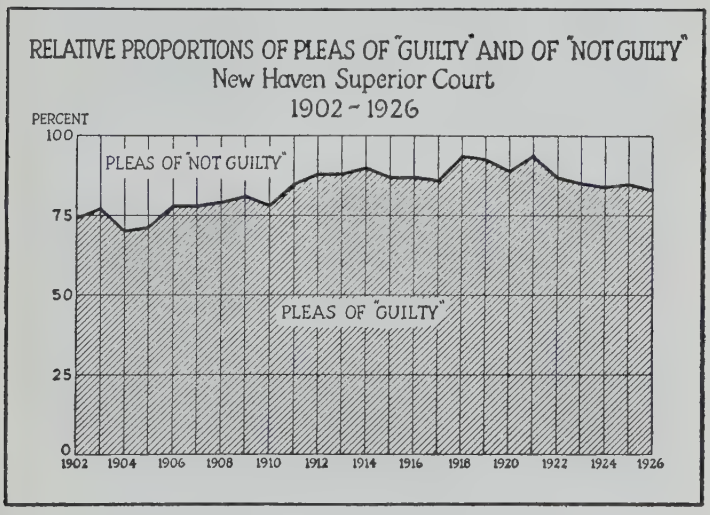
for Cincinnati from Donald Stone, for Scranton from District Attorney Harold Scragg, for Pittsburgh from Gustav Schramm, and for Detroit, Denver, Omaha, and Des Moines from Thomas Dabagh. In spite of the difficulty under which such a compilation is made and the danger of error, I feel that these data are accurate and generally comparable.

The record of San Francisco shown in this table is so strikingly out of line with the tendency in other cities that it deserves more complete investigation than we have been able to make. The figures are taken from the reports of the attorney general of California. One explanation which has been ventured by a district attorney familiar with the conditions in California is that defendants in San Francisco feel confident of winning their cases if they plead not guilty in that jurisdiction. Some doubt is thrown upon this explanation, however, by the further fact revealed in the attorney general's reports that the state in San Francisco wins a larger percentage of jury trials than in most of the other cities. The tendency in San Francisco toward a large percentage of pleas of not guilty has been fairly continuous over a considerable period of years, although under a very vigorous administration of the office some years ago the percentage of pleas of guilty was much larger and, in fact, approximated the present general tendency elsewhere in the country. It is worth noting here also that the method of returning the reports to the attorney general which is in practice in the district attorney's office of San Francisco may be such as to make it impossible to compare reports there with other counties.

wherever reliable data have been assembled. Stated another way, the jury is responsible for less than one-third of the cases in which convictions are secured. Another question remains to be answered. Is this substitution of pleas for jury trials increasing? Is the jury actually falling into disuse? A conclusive answer to this can be found only by laboriously unearthing thousands of court records in a number of states to determine the disposition of cases over a period of many years. Authentic reports are accessible for only a few states. The reports of the Attorney General of California have since the biennial period 1905-1906 separated "convictions on plea" from "convictions by jury." A study of the relative proportion of "convicted on plea" in the biennial periods since that time indicates no trend of importance. The proportion of pleas of guilty for the entire state for 1905-1906 was seventy per cent; for the most recent period the percentage was about the same. The highest proportion was seventy-five in 1921-1922; the lowest, sixty-three in 1917-1918. Thus there is no indication of a decline in the use of the jury in California in approximately twenty years.

The data for Connecticut, which are to be found in the reports of the comptroller, are more illuminating. They indicate that there has been a fairly definite increase in the proportion of pleas of guilty in the past generation. Measuring the returns from one of the large courts, the New Haven Superior Court since 1888, there is an increase from about seventy-five per cent to more than ninety in 1921. In Graph 3 the per cent of pleas of guilty for each year from 1888 to 1921 is indicated. This graph

shows that there has been a definite tendency away from trial by jury. The period of time covered is sufficiently long to render extremely unlikely any considerable variation due to personalities in judicial or prosecuting offi-

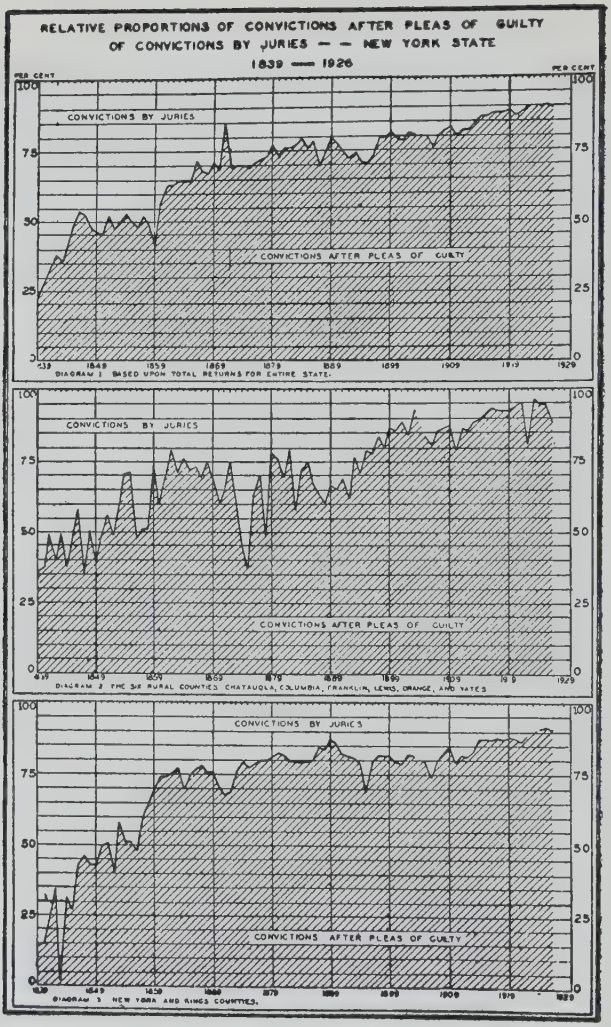


GRAPH 3
Proportion of pleas of guilty in the New Haven Superior Court over a period of years

cers. The trend is we believe a significant index marking the slow decline of the jury.

The most impressive data, however, relate to New York. A very old statute * has required the district attorneys of that state to submit certain reports annually to the Secretary of State. These reports show for each county

* Amended in 1927.



GRAPH 4

Proportion of convictions by pleas of guilty compared with convictions by jury in various jurisdictions of New York State

the number of felony convictions "by jury" and "by confession." We were able to secure these from 1839 to 1926, and to tabulate and graph the percentages of convictions on plea and by verdict for this entire period of eighty-eight years.*

In preparing Graph 4 we have made three groupings of data, the figures for the entire state, for six typical rural counties and for the urban counties of New York and Kings. We have shown these separately to indicate whether there is any significant difference in trend between rural and urban jurisdictions. New York and Kings Counties were merged in Greater New York in 1897 and a combination of the two is a fair picture of the tendency in the urban community of New York.

This graph demonstrates rather forcefully not only the great extent to which pleas have taken the place of jury trials, but the very significant fact that this substitution has increased from generation to generation. It may not be an unjustified conclusion to say in the words of the New York Crime Commission that the steady decline in the use of the jury over this long period "points to a time when the jury will be used only in the most unusual cases."

* This analysis which I prepared for the Crime Commission of New York State is published in full in the 1928 Report of the Commission.

CHAPTER VIII

JUSTICE BY COMPROMISE

IN addition to the method of securing pleas of guilty by the express or implied promise of leniency in sentencing, there is the much more common practice of compromising cases through the acceptance of pleas of guilty to an offense less serious than the one originally charged. Pleading guilty to a lesser offense may take a number of forms. The felony charge may be waived entirely by the state and the defendant may plead to a misdemeanor, as where a defendant may be charged with larceny from the person (pocket-picking) and may plead guilty to "jostling," a misdemeanor. The defendant may be charged with a serious felony and may plead guilty to a less serious one, as where a charge of robbery is made and the defendant pleads to assault.

The relative proportion of legal responsibility resting upon the judge and the prosecutor respectively in accepting pleas to a lesser offense has not received exact legal determination. For our purposes it is not necessary to pursue the point. The judges of trial courts in most of the cities for which we have dependable information have in practice permitted the prosecutors to exercise

about the same amount of discretion in accepting compromise pleas as they have in entering nolle prosequis. This has made it possible for the practice of "bargaining for pleas" to assume very large proportions in the administration of criminal justice, particularly in the large cities. It has become standard practice in New York and Chicago and is freely admitted, discussed, and defended by prosecutors generally. Until recently, however, it has attracted little public attention. This is largely because it is so difficult to assemble mass facts concerning the prevalence of such practices. On account of the various ways in which a reduction of charge can be accomplished and the methods of interpreting these reductions in official reports and records, it is extremely difficult to isolate the real facts for serious study. No prosecutor's report that has been found carries any such tabulation and probably no attorney general has requested such reports. While there is mention of it in the Cleveland Survey in 1921, none of the other surveys of criminal justice until the Missouri Survey in 1925 gave attention to it. Since then the New York and the Illinois crime commissions have developed some significant and arresting facts concerning this method of compromise. It has become a matter of common discussion in New York, and has there received due judicial notice. Its prevalence in Illinois has been noted, and it has become the subject of an investigation by the judges of the Criminal Court of Cook County.

It is impossible, therefore, to present data concerning this practice from many jurisdictions. It is worth while,

however, to look at the facts disclosed in Missouri, New York, Cleveland, and Illinois and consider the public comment and activities resulting therefrom.

The Missouri figures are inadequate because it is impossible to determine how often a prosecutor refuses a felony warrant with the suggestion to the police officer that a minor charge be brought in the police court. Moreover, in that state bargains are frequently made on the basis of pleas to the offense charged in exchange for an agreement for parole. Even so the proportion of cases pleading guilty to a lesser offense upon or after arraignment is not small. Of those cases in which guilt was established about eighteen per cent were on pleas to a lesser offense.

The statistics gathered by the Crime Commission of New York State illustrate in a more striking manner the extent to which pleas to a lesser offense have come to be a factor in the disposition of criminal cases. There are two reports issued by the New York Commission in which figures concerning this subject are set forth and analyzed. The first covers the criminal cases initiated in 1925, and the second, those cases initiated in the second half of 1926. Since the tendency is almost identically the same for both periods only the more recent cases need be considered.* The following table indicates the proportions of pleas of all sorts:

* A summary of the 1925 cases will be found in an article by Senator John Knight in *Current History*, Vol. XXVII, pp. 320-325. The references to the subject are on pp. 130-133 of the 1927 *Report of the Crime Commission of New York State* and on pp. 11-16 of the 1928 *Report of the Subcommission on Statistics of the Crime Commission.*

PLEAS IN NEW YORK, 1926

Kinds of Pleas	Total for State	New York City	Large Upstate Cities	Small Cities	Rural
Guilty of offense charged.	26.8	9.3	49.1	49.0	49.9
Guilty of other offense...	37.5	52.5	23.4	18.3	14.4
Not Guilty	29.7	32.2	23.2	26.1	28.8
Other Pleas	6.	6.	4.3	6.1	6.9

In this table the most striking thing is the predominance of pleas to a lesser offense in New York City. The proportion of "pleas to the offense charged" was less than ten per cent of all pleas, while in other parts of the state it was fifty per cent. Thus the practice of accepting a plea to a lesser offense was in New York City much more frequent than elsewhere in the state. While the 1926 figures are not organized to show the exact counties of New York City where the practice was most common, it is probable that the proportions were not unlike those of 1925. In that year fifty-seven per cent of all pleas in Kings County were to a lesser offense while only twelve were to the offense charged. In New York County the percentages were forty-nine and twelve. On the other hand Rochester showed that only two per cent of all pleas were to a lesser offense while sixty-seven were to the offense charged.

There is no better example of criminal law administration through and by the prosecutor than in what has happened in New York City in connection with the fourth offender law commonly known as the Baumes Law. This law provides in brief that in cases where three prior felony convictions are established, a fourth conviction must result in life sentence. Discretion is taken away from the

judge and subsequently from the parole board in dealing with such offenders. Some judges were outspoken in their condemnation of this deprivation of their discretionary power and the district attorney of New York County had serious doubts as to the wisdom of such a law. Considering this attitude on the part of the district attorney's office, it is interesting to observe what has happened in the actual administration of this law in the City of New York. The New York City police department submitted to the author a complete list of all "fourth offender cases" filed in the courts by them from January 1, 1927 to January 12, 1928.* There were sixty-five and they were disposed of as follows:

Seventeen were tried, found guilty, and sentenced to life imprisonment.

Three were found guilty of the felony charged in the arrest and are being investigated.

Fourteen were permitted to plead guilty to misdemeanors and were sentenced to the City Penitentiary or the workhouse.

Two were tried for a felony, found guilty of a misdemeanor by the jury and punished as such.

Twenty-three were found not guilty, discharged or dismissed.

Six were delivered over to other police authorities.

This record indicates that excluding the six who were delivered over to other authorities and the three whose

* The data for 1928 compiled while this book was in press show a tendency similar to that of 1927.

cases were under investigation, sixty per cent were punished for something and forty per cent went free. Let us assume that the forty per cent were innocent and leave them out of consideration. The fact remains that thirty-three or sixty per cent of all the cases in question were guilty of something. Of these, sixteen, or about one half, were permitted to plead to or were found guilty of a crime which assured them a sentence much less severe than the one prescribed by law for the crime committed, and in addition they escaped the serious consequences of the Baumes Law. The following list indicates with what offense the fourteen persons who escaped life convictions by pleading were originally charged, and also the crime to which they were permitted to plead guilty:

Six were charged with burglary and were permitted to plead to unlawful entry.

Two were charged with grand larceny and were permitted to plead guilty to petit larceny.

One was charged with grand larceny and was permitted to plead as "disorderly person."

One was charged with extortion and was permitted to plead guilty to a lesser degree of the same offense.

One was charged with felonious assault and was permitted to plead guilty to simple assault.

One was charged with extortion and was permitted to plead guilty to petit larceny.

Two were charged with grand larceny, were tried and were found guilty of petit larceny.

In six of these fourteen cases the punishment was not

over six months in the workhouse; in one it was thirty days, and in another only ten days.

This is the record of the Baumes Law in New York City. It shows that, where the evidence was fairly conclusive and the accused persons were willing to plead guilty, the district attorney, with the approval of the court, decided that in half of the cases against fourth offenders, the law would have resulted in unjust punishment. Through the subterfuge of a lesser plea they were permitted to escape the legislators' well made plans. It would be unfair not to state here that there may have been differences of opinion between the police and the prosecutors and the judges as to the validity of the criminal records of these men. The fact remains, however, that the police, who undoubtedly have better facilities for determining prior records of criminals than the district attorneys or the courts, were satisfied that they had arrested authentic "fourth offenders."

While the New York practice of accepting pleas to a lesser offense had been common for a long time, it was not until the Baumes Law that it became the subject of widespread public discussion. Reluctance upon the part of certain judges and district attorneys to accept the inflexible conditions of this law caused them to use the power of permitting pleas to a lesser offense to mitigate its severity. When this happened, the newspapers favorable to the law entered violent protest. The whole practice was thereupon dragged into the light. The extreme length to which it had gone was disclosed and the public learned how much the spirit of an auction had come to dominate

the process of justice. The following account by a newspaper humorist, Mr. Frank Sullivan, is somewhat exaggerated but suggestive:

"'Did you take the $1000 from Sam?' inquired the judge.

"The defendant pondered a moment and answered, 'If I say I did what will you give me?'

"The judge mentioned a series of years that mounted into two figures.

"The defendant was non-committal.

"'Are you going to plead or not?' inquired the assistant district attorney.

"'What kind of pleas have you?' asked the defendant.

"The assistant district attorney rubbed his hands briskly and beamed at the customer.

"'We have some very nice pleas today. What would you say to the first degree robbery?'

"'How much?' shopped the defendant.

"'Oh, twenty years,' assured the assistant district attorney.

"'Too much,' objected the defendant. 'I can't give that much.'

"'First degree suits you so well. You're just the type.'

"'No-o! What else have you?'

"'Well, we have some nice second degree robberies.'

"'How much are those?'

"'Fifteen years.'

"'I can't stand fifteen: no. I can't stand fifteen. What else have you?'

"'We have third degree robbery.'

"'How much are they?'

"'Our third degree robberies are ten years.'

"The defendant still appeared dissatisfied.

"'It's getting terrible, these sentences,' he declared. 'It's getting so you can't look at a crime for less than five or ten years now.'

"'Our ten-year sentences wear well,' the assistant district attorney assured him.

"'No, I don't want—I don't believe—have you any petty larcenies? I'll take a nice petty larceny if you have one.'

"At this point, according to the commentator, the judge stopped the colloquy and said, 'This is not bargain day here. You go on trial for a first degree robbery.'" *

During the discussion of "bargaining for pleas" a case came before the Appellate Division of the First Department of the Supreme Court of New York which involved the acceptance of a plea to a lesser offense by a "fourth offender." † In the course of the opinion the court pointedly commented upon the practice of accepting pleas to a lesser offense:

"It is a matter of common knowledge that district attorneys frequently bargain with those charged with crime, and either under promise of immunity or acceptance of a plea of lesser degree than that for which the defendant was indicted, those deserving of extreme punishment are permitted to escape with a suspended sentence or with punishment all too inadequate for the crime committed. We deplore the tendency of some district attorneys, following the course of least resistance, thus to relax the rigid enforcement of our penal statutes. We think there has been altogether too much leniency shown in dealing with the criminal —particularly with confessed convicts."

When the same case subsequently reached the Court of Appeals the opinion, while offering no comment upon

* Personal investigation has convinced me that Mr. Sullivan's account is not a serious exaggeration. Sophisticated defendants call arraignment time, "bargain day," and assistant district attorneys often approach the defendant much in the spirit of a market place.

† People v. Gowasky and Hemerlein, 219 N. Y. (App. Div.) 373 (1926). The citation of the same in the Court of Appeals is 244 N. Y. 451 (1927).

the general question of accepting pleas to a lesser offense, admonished district attorneys to

"be careful not to take a plea from a prisoner of a lesser degree of crime under circumstances which may lead him to believe that he is not to be dealt with as a second offender. . . . Where there is any misunderstanding as to the circumstances under which a plea of guilty was taken, the judge might very well exercise his discretion, permit the pleas to be withdrawn and place the defendant on trial. . . . Especially should there be no intimations of a lower sentence for a plea, as neither the court nor district attorney have any discretion under section 1943 of the Penal Law regarding the punishment. This is fixed by statute—not by the court. The district attorney is charged with the duty of filing an information accusing the convicted defendant of his previous convictions. This is not discretionary, it is mandatory."

The Cleveland Survey found that the most serious abuses in prosecution centered about the granting of the nolle prosequi. Much space is devoted to this subject. The practice of accepting pleas to a lesser offense, however, received some comment and the statistical studies conducted by the survey indicated that a small proportion of all cases in which guilt was determined was after a plea of guilty to a lesser offense. This however did not cover cases in which felonies were waived in preliminary hearing. The Cleveland Survey did however furnish a delightful bit of realism, illustrating quite vividly the possibility of abuse of a plea to a lesser offense which deserves quoting in full although it is an extremely unusual case, that is more illustrative of plain trickery than subterfuge:

"The case of Charles McCormack furnishes an illustration of the possibilities in existing methods and practices. McCormack was arrested on the public square of Cleveland on the night of Saturday, April 23, 1921, for pocket-picking on April 21. On the night of the arrest, about midnight, Assistant Municipal Prosecutor Kreisberg came to Lieutenant C.'s desk at the central police station with two other men for the purpose of inquiring about getting a bond for McCormack. McCormack's attorney was X, closely related to a well-known, influential Republican 'politician.'

"The police blotter contains the words 'Pocketpicking' and 'Picked the pocket of William Smith.' In a different ink, lines were drawn through these words, and, in both different ink and handwriting, there was substituted, 'Petit larceny' and 'stole $33.' The affidavit charges petit larceny; the bail bond charges pocketpicking. The former is a misdemeanor, the latter a felony. When the case was called before Judge A. on Monday morning, McCormack pled guilty and was fined $50 and sentenced to thirty days. A motion for mitigation of sentence was over-ruled. The records contain no statement of reasons for or justification of this reduction. The case appeared as No. 25 on the prosecutor's docket for April 25, and appeared as No. 24 on the judge's docket in Judge A.'s room. The docket in Room 1 was written in green ink, and in the column for entering the charge appeared the charge 'pocketpicking,' over which, however, in pencil, was written 'petit larceny.' On the docket in Judge A.'s room in which the case was heard, and the entire docket of which was written in pencil, appears the word 'pocketpicking' in pencil of the same color as the rest of the docket, and over this in red pencil, 'petit larceny.' Petit larceny does not bear to pocketpicking the relation of lesser degree of the same type of offense, as for instance, manslaughter is a lesser degree of homicide than murder, or petit larceny a lesser degree of the same offense as grand larceny."

The survey shows on another page the tremendous police record of the defendant in this case which indi-

cates an almost miraculous ability to escape the clutches of the law.

Figures assembled by the Illinois Association for Criminal Justice constitute the most serious indictment yet drawn of the use by a prosecutor of this method of disposing of cases. We indicate in the following table exactly what happened in Chicago to the cases in which indictments were returned in 1926.*

WHAT IT MEANS TO BE GUILTY IN CHICAGO

	Number	Percentage
Total number of indictments returned, 1926	4,982	.....
Total number of these ultimately found guilty	2,449	100.00
Felony waived, tried and convicted	266	10.86
Felony waived, plea of guilty	836	34.12
Adjudged insane	5	.20
Plea of guilty of offense charged	419	17.11
Plea of guilty of lesser offense	723	29.52
Convicted of offense charged by jury	175	7.15
Convicted of lesser offense by jury	25	1.02

This table shows the diversity of ways in which guilt is established in the city of Chicago. A defendant may be permitted to plead guilty of a lesser offense or, what is about the same thing, to secure from the state a waiver of the felony charge and to plead guilty to something else. The state may also waive the felony charge and the defendant can be tried by the court for a misdemeanor. The jury also may reduce the felony to a misdemeanor, as they did in twenty-five cases. Thus, when the defendant has actually reached the point where his guilt has been determined, in most cases he is not found guilty

* The discussion of these cases in the two pages following is based upon a memorandum prepared by me for the Illinois Association for Criminal Justice.

of the crime of which he was originally charged. The items in the foregoing table may be rearranged as follows:

Total number of felony charges resulting in finding of guilty	....	2,449
Plea of guilty of offense charged, accepted	419	.....
Convicted of offense charged by jury	175	.....
Total number found guilty of crime originally charged	....	594
Felony waived, plea of guilty, convicted of misdemeanor	836	.....
Felony waived, tried by judge, convicted of misdemeanor	266	.....
Plea of guilty of lesser offense, accepted	723	.....
Convicted of lesser offense by jury	25	.....
Adjudged insane	5	.....
Total number found guilty of lesser crimes than those charged	....	1,855

These figures seem still more significant when it is recalled that the entire grist of felony cases initiated in Chicago in 1926 was 12,543, of which 10,094 were eliminated and 2,449 were convicted. The table above indicates that of the group convicted 1,855 were convicted of lesser offenses than the ones originally charged. From the 594 who were convicted as charged in the indictment certain other deductions are necessary:

Total convicted as charged		594
Probation	173	
Other modifications	4	
Appealed and reversed	2	
New trials resulting in acquittals or convictions for lesser offenses	21	
		200
Total punished for offense originally charged		394

Thus, of the 12,543 felony prosecutions, only 394 or 3.13 per cent were finally punished for the offense originally charged in the indictment. Of these, 249 were punished on pleas of guilty and 145 or slightly more than one per cent of the cases which were initiated in Chicago in 1926 for felonies were actually found guilty of felonies by a jury. The crimes in which lesser offenses are most frequently accepted in Cook County are robbery, burglary and larceny. Petit larceny is the most frequent charge to which these cases are reduced. Personal crimes such as homicide and rape are most frequently punished in accordance with the original charge. Of the 1,855 felony charges reduced to a lesser offense, 973 were finally punished as petit larceny. Petit larceny according to the statutes of Illinois involves the theft of property of the value of $15 or less and prescribes punishment "in the County Jail or sentence to labor in the workhouse of the county, state or town where the conviction is had or on the streets or alleys of the city," for a term not exceeding one year, or a fine not exceeding $100. Mr. John J. Healy, a former State's Attorney of Cook County, makes this comment concerning the figures here recited: "If law enforcement is to be reduced to such a petty gesture as this table indicates, there should be slight wonder that criminals choose to ply their dangerous trade under such conditions. When robberies, which are charged according to the police, in 871 cases come down finally to punishment for petit larceny, grand larceny, or even plain robbery, it is absurd to talk about punishing for robberies or driving robbers

from the city. Law enforcement under such conditions becomes a farce and travesty upon justice."

In addition to this tendency toward undue leniency another very serious aspect of the practice of compromising for pleas is the embarrassment often caused a parole board by promises made prior to the plea, by prosecutor, or trial judge, or both. An instance is cited in a recent report upon parole in Illinois, in which the Parole Board was asked by the trial judge and the prosecutor to parole a prisoner in the state reformatory because a promise had been made as an inducement to plead guilty. The Parole Board was convinced that the prisoner should be held for a longer period of imprisonment. It denied the recommendations of the trial judge and the prosecutor. It was thus necessary to create a situation which was artfully but not unfairly phrased in the following terms by an attorney for the prisoner:

"Would not the bad effect of an apparent breach of good faith by the people of the State of Illinois be so bad as to more than offset the possible advantages or desirability of further punishment? I cannot help but feel you will agree with me in saying that if the boys have in good faith tried to make good in the Reformatory, then the State should in good faith try to carry out that to which the State's Attorney and the Trial Judge pledged them insofar as they had the power to pledge them."

In summing up for the Committee which was responsible for the Illinois report,* Dean Albert J. Harno states

* This report was published as a part of the May, 1928, issue of the *Journal of the American Institute of Criminal Law and Criminology* (Volume XIX, No. 1). The Commission was composed of Professors A. A. Bruce of Northwestern University, E. W. Burgess of the University of Chicago and Dean Albert J. Harno of the Law School of the University of Illinois.

his opinion of the dangers involved in compromises in rather forceful terms:

"When the plea of guilty is found in records it is almost certain to have in the background, particularly in Cook County, a session of bargaining with the State's Attorney. . . . These approaches, particularly in Cook County, are frequently made through another person called a 'fixer.' This sort of person is an abomination and it is a serious indictment against our system of criminal administration that such a leech not only can exist but thrive. The 'fixer' is just what the word indicates. As to qualifications, he has none, except that he may be a person of some small political influence. . . . A study made by the Committee April 26, 1927, of all the prisoners in Pontiac showed that out of a total of 1637 inmates then present 'lesser pleas' had been accepted for 571 who had been sentenced on the basis of such pleas. Of the 571, 104 came from down-state and 467 from Cook County.

"In fact, of the total of 773 inmates at Pontiac from Cook County, 60.4 per cent had been sentenced upon the acceptance of a lesser plea; while of the 864 inmates from down-state, only 12.0 per cent had been so sentenced. . . .

"So that the Board may not be embarrassed, it is desirable that no representations be made to a prisoner concerning the time of his confinement other than the legal limits of his sentence, and certainly there should never be a representation to him that, if he plead guilty, he might expect to be released at the minimum or any other period short of the maximum with the possible exception that he might expect allowances for good behavior within prison. In the administration of the law various officers must work elbow to elbow; effective work can be done only if each recognizes and respects the functions of the others." *

Largely as a result of the publication of the figures summarized in the foregoing paragraphs, the Chicago

* Ibid., pp. 103-11.

Crime Commission through its president, Frank J. Loesch, addressed to the judges of the Circuit and Superior Courts a letter, reciting the fact that three judges of that court, while sitting as judges of criminal cases, had permitted a very large proportion of felonies to be waived in consideration for a plea of guilty to a misdemeanor. This letter charged the three named judges with "paltering with crime," and stated that they should not be permitted to sit longer in the criminal court. The judges of the Circuit and Superior Courts adopted resolutions providing for the investigation of the question by a committee of judges which after extensive hearings rendered a report that was made public with the alleged approval of the membership of the Circuit and Superior courts in June, 1928.*

The bill of particulars of the Crime Commission alleged that the three judges in question "failed, neglected and refused to properly, faithfully and legally discharge the function of their said several and special judicial offices and thereby brought the administration of criminal justice into disrepute, by reason whereof the public welfare and public well-being suffered irreparable harm and injury." The particular charges were that the three judges had entered orders waiving felony charges and had accepted pleas to lesser offenses "so that the accused escaped with less punishment (or none at all) than was prescribed by the statutes." Moreover these orders of waiver in many

* There are two trial courts in Cook County, the Circuit Court and the Superior Court, with practically concurrent jurisdiction. The so-called Criminal Court of Cook County is a separate court created by statute but manned by ex-officio judges of the two trial courts. The investigation here described was conducted by a committee composed of three members of each of the two trial courts.

cases involved murder, robbery, gun and burglary counts in the indictment. The Commission further charged that in performing these acts the three judges had been "improperly actuated and influenced by considerations emanating from the political condition which has existed in Cook County for a number of years last past." The bill of particulars concluded with a demand that the judges be recalled from service in the Criminal Court.

The report of this committee of judges reviews in some detail the question of waiving felonies in the Criminal Court of Cook County. The practice so far as the Committee was able to ascertain has prevailed continuously since the adoption of the constitution in 1870. "For a quarter of a century, or more, not less than twenty-two per cent of all indictments disposed of were disposed of by the process of waiving the felony. In the years 1917-18 it rose to forty-eight per cent, in 1911-12 to forty-seven per cent, and during the eight months ending April 30, 1928, it was forty-four per cent." An examination of the tables submitted by the judges, however, indicates that in the last ten years with some variation the practice has definitely increased. In 1919 "the percentage of felonies waived to defendants disposed of" was 14.05. The result for the eight months ending April 30, 1928, was 34.87. With some variation the increase was fairly continuous. The judges' report concludes that the number of felonies waived by the given judge has no relation to his own personality or views on the subject of waivers, "but is determined almost altogether by the type of cases disposed of by him" and that "unless judgment is passed on

each case where the motion of the state's attorney to waive the felony was allowed (a thing impossible to do) there can be no justification for questioning the action of the judge."

The sum total of the opinion of the judges' Committee was that there was serious doubt in their minds "as to whether in a case commissioned by the State's attorney in his representative capacity, he has not the absolute control of the prosecution; and if he has the power entirely to discontinue the prosecution, he certainly has the power to determine for himself upon which count or upon which offense included in the indictment, or any count thereof, he will proceed and ask conviction." While the Committee refrained from expressing a definite opinion as to whether the court could refuse the granting of such a motion it was of the opinion "that no just criticism can be made of any judge who acts by recommendation of the state's attorney with or without inquiry into the reasons that prompt him to waive the felony in any case." Moreover they add that they would regard it as a "dangerous rule of practice" to look with suspicion upon the acts of the state's attorney "or to treat his official acts as if no presumption of his integrity might be indulged in."

The committee, moreover, reviewed the evidence presented concerning specific cases in which felonies were waived and found the judges without fault in their actions concerning each. It concluded its report by calling attention to the fact that fewer felonies were being waived subsequent to the publication of the Crime Commission's

charges and by asserting that more judges were required properly to handle the volume of business coming before the criminal court.

This report, however, was challenged by individual members of the two courts, notably Judge Marcus A. Kavanaugh, who in a newspaper interview stated that "it is a dangerous and unfortunate statement when they say a judge is not responsible for his own acts. This is not true in law nor in fact. . . . While the state's attorney must be depended upon for much information, still any judge who depends entirely on the state's attorney for his decisions is mistaking the functions of his office. The waiving of felonies and bargaining with criminals is a crying evil in the administration of justice in this country."

Compromises of pleas are vigorously defended by district attorneys and judges with arguments that have a certain measure of justification: (1) It is asserted that the acceptance of pleas of guilty is a quick way of disposing of cases. It clears the docket. It saves expense. This, it is said, is especially necessary in large urban communities where great numbers of cases burden the inadequate staffs of the prosecutor. (2) With a large number of cases out of the way through the acceptance of pleas of guilty, it is possible to give more attention to the few jury trials that remain. (3) When faced by a defendant whose defense seems to be strong, it is better not to take a chance of losing the case before a jury but to make certain of at least a small amount of punishment for the offender. Half a loaf is better! (4) Oftentimes the charge fixed in the

indictment is not a true measure of the seriousness of the case as the prosecutor sees it. A more serious charge than is justified may be made for the specific purpose of frightening the defendant into offering a plea to a lesser offense, which may be the real measure of the crime. (5) Real justice can sometimes be achieved best by compromising a case out of court. Cases involving juveniles or innocent persons, who may be subjected to shame and injury by dragging evidence before the public in a jury trial, are often settled by taking a plea to a lesser offense.

These arguments deserve serious consideration. There is no question about the validity of the last one cited. It is an argument for informality in hearing evidence with an attendant preservation of the human values involved. It is just as strong an argument for adequate provision for an informal hearing of the case by a judge in the manner in which certain matters are handled in the juvenile court. The fourth mentioned argument may be briefly dismissed. There is no justification for such unadulterated bluffing. It means that a false charge is brought against the defendant in order to frighten him into confessing to a lesser offense. A solemn indictment is turned into a false threat. This deserves nothing but condemnation. No considerations of "practical" measures can excuse it. The first three arguments can, in substance, be summed up by saying that under modern conditions the burden of criminal litigation is so great that instead of observing the forms of judicial trials it is necessary to dispose of cases by administrative action, which is more expeditious. With certain litigation this has come to be

quite true. Before accepting it, however, certain facts ought to be placed in the record. The first is that available statistical evidence does not show that those prosecutors who accept large numbers of pleas of guilty win a larger proportion of their jury trials. For example, the proportion of acceptance of pleas to a lesser offense is high in Kings County, New York, and the proportion of jury verdicts of guilty is very low. We cannot, of course, tell whether the proportion of acquittals would have been still higher in this county had the State refused to compromise so often. It probably would have been. (It might have been so bad as to injure the public reputation of the district attorney.) Against the argument of the "half loaf" it can be said, moreover, that it is not the business of the prosecutor to get as many convictions as possible. It is duty of the State to see that justice is done within reasonable limits. Either a person is guilty of the crime charged, or he is not. It does not satisfy the requirements of justice to punish him for one crime because it is impossible to punish him for the correct one. The value of the services of a prosecuting officer should not be rated by the number of persons whose guilt he has established.

There remains nevertheless a measure of significance in the argument of the district attorneys in favor of the practice of compromising cases. The whole tendency represents a drift in the direction of individualizing the treatment of offenders. What actually should happen in all criminal cases is an attempt to adjust treatment to the needs of the individual case though statutory penalties make this difficult. Yet such individualization is at the

heart of most forward-looking reforms of recent times, particularly probation. The practice, however, of vesting this discretion and individualization in the hands of prosecuting attorneys leaves much to be desired. A prosecutor is to some extent a judge in his own cause. With present methods of establishing his "efficiency" before the public, he is able through compromising large numbers of cases to appear to be getting large numbers of convictions when, in fact, his convictions are to a large extent merely theoretical.* Moreover, it is easy for a prosecutor to avoid labor in this way merely for the purpose of expending his best energies upon sensational and politically advantageous exploits in court.

The relation of the practice of compromising to parole has been mentioned. It is also related to the development of probation. Acceptance of a plea to a lesser offense usually prevents the application of probation in many cases where probation would be a wiser solution. The prosecutor may think that a small punishment is better, because the act is a first offense, but this is an assumption on his part that probation in such a case is not a wiser way to treat the person accused. It is a much more consistent and sound practice to insist upon a plea to the offense charged and to place the defendant on probation than to resort to the legal fiction of a plea to another offense with no subsequent control over the offender after his light sentence is satisfied.

Measured even by a criminal law that is full of incon-

* See *Special Bulletin No. 30* of the Cleveland Association for Criminal Justice.

sistencies, the practice is absurdly illogical. In Chicago a Rolls Royce car is stolen. The person charged with this offense is permitted to plead to petit larceny, and the felony is waived. Thus, it is legally decided that no Rolls Royce car but some unnamed article was stolen. An offense is created out of thin air, and someone is punished for it. Another offense has actually been committed and no one is punished. There is no further attempt to punish anyone, and presumably the Rolls Royce car is, by this fiction, conjured out of existence. This objection is admittedly a technical one however.

The practice is objectionable also because it is essentially a secret or semi-secret process. It takes on the air of shady dealing although it may not be—probably seldom is—shady. It is in its method and its implications a process of driving a bargain—a game of wits. It is psychologically more akin to a game of poker than to a process of justice. The considerations upon which an open trial in open court are built are disregarded. It is not a search for truth; it is an attempt to get as much from an unwilling giver as is possible.

Worst of all, it carries little public responsibility. It leaves few marks upon the record. Such determinations are almost never subjected to the scrutiny of a higher court. The very difficulty with which the facts concerning this practice have been unearthed show how easy it has been for prosecutors to indulge in this sort of compromise without exciting public interest. It has cost thousands of dollars in Missouri, Cleveland, New York and Illinois to develop the facts here summarized. A very

careful search in other jurisdictions, including in at least a score of instances visits to prosecutors' offices, has yielded no light as to the actual disposition of cases, thousands of which were unquestionably compromised. It is not surprising, then, that prosecutors have indulged to their heart's desire in the politically profitable enterprise of making friends among the friends of accused persons while at the same time and by the same acts they were building an apparent record of vigorous and successful prosecutions.

The exercise of discretion to the extent of nullifying of the law is of course not a new aspect of human activity. An interesting historical example is in point. In 1822 the French Government sent to England one Monsieur Cottu who conducted the first criminal justice survey on record.* He was *Counsellor of the Royal Court of Paris and General Counsel of the Society of Prisons* and consequently his observations are those of a trained and practical French lawyer. He noticed that early in the 19th century on account of the fact that almost every kind of robbery incurred capital punishment "the magistrates in the view of easing those courts of a burden that might be too great for them; by a fiction which they countenanced at the first hearing contrived to make the Quarter Sessions competent for a multitude of cases which in the strictness of law, ought to be transmitted to the courts of Assize. . . . This fiction consists, in some cases, in lessening with the privity of the prosecutor, the value

* C. Cottu, *Criminal Justice in England.* (Translated from the French, London, 1822.)

of the articles stolen; in leaving out some of the aggravating circumstances, as night and house breaking."

The remedy for these conditions is not a direct attack upon the practice of prosecutors. The range of methods by which criminal charges can be disposed of is so great that merely to shut off one practice will open up others. The way to restrict the discretion of the prosecutor is to give wide powers to the judge. There is evidence that a large part of what is accomplished in Canada and England through trial by the judge alone is being met in this country in a haphazard and unsatisfactory manner by the use of the prosecutor's discretionary power. It is probable that if we should attempt more widely the use of trials by the judge alone on the election of the defense, we should note an immediate decline in the proportion of pleas of guilty. There is rather significant evidence that since the adoption in 1921 by the State of Connecticut of permissive waivers of jury trials the proportion of pleas of guilty has declined.* It is not the exercise of discretion that we should attempt to prevent. The tendency to create out of the law a loose pattern with details to be supplied in individual cases is a wise and happy portent of an age which recognizes that in the criminal law there is need of a wide individualization of application. Discretion, however, should be granted with a nice sense of the fitness of things. In a great legal masterpiece the principle that should guide remedial measures has been formulated:

* See page 163. The chart shown there indicates a distinct decline in pleas of guilty since 1921.

"As time goes on there is always a larger room for discretion in the laws of procedure; but discretionary powers can only be safely entrusted to judges where impartiality is above suspicion *and where every act is exposed to public and professional criticism.*" *

* Pollock and Maitland, *History of English Law* (2nd Ed., 1899), II, 563.

CHAPTER IX

PROSECUTION IN ENGLAND AND CANADA

ENGLISH criminal procedure is still strongly colored by the tradition prevalent in early times that the surest method of bringing wrongdoers to justice was to leave them to the tender mercies of the person injured, or of his kinsmen or friends.* Physical force seemed to be the natural method of redressing wrongs and the warlike races of Saxon England submitted unreadily to the compulsion of law and the authority of courts. The first step toward a more orderly administration of justice was the substitution of the public contest for the unofficial skirmish. But primitive institutions such as compurgation and the ordeal, while conducted in accordance with prescribed legal forms, were in reality little more than crude substitutes for private war. And under the Norman institution of appeal—a right of prosecution possessed as a personal privilege by the injured person or his relatives in felony cases—the proceedings were instituted by private accusation and the judges who entertained the complaint were empowered to order the question of guilt to depend upon the result of a trial by combat between the com-

* See Stephen, *A History of the Criminal Law of England,* Vol. I, p. 245.

plainant and the accused.* Later on, when the institution of trial by jury was adapted to the purposes of criminal law administration and gradually came to supplant earlier guilt-finding devices, this characteristically English type of prosecution, frequently described as the accusatory system, contemplated two contenders performing before a theoretically impartial judge with a jury to determine the outcome.

The original functions of justices of the peace included such activities in respect of the detection, apprehension and prosecution of those accused of crime as in many other countries were vested in prosecuting officials.† King Edward III made of the justice a sort of superior and extraordinarily effective police officer who kept order, prevented riots, assaults and other crimes of violence, and frequently compelled marauders to give surety for their good behavior. In the course of time, however, justices came more and more to assume purely judicial functions, their prosecuting activities being taken over by various types of peace officers. The failure of the state to create public agencies, other than the police, to carry on the task of managing criminal proceedings in the courts was largely responsible for the evolution of a system of privately instituted and conducted prosecutions. Criminal trials, under these new conditions, became to a lesser

* It is a fact often lost sight of that trial by battle, as a method of settling criminal issues, survived into the nineteenth century, not being legally abolished until 1819 (59 Geo. III, c. 46), although it had been used but rarely for a century prior thereto.

† See Stephen, op. cit., Vol. I, pp. 496-498. See also Beard, *The Office of Justice of the Peace in England in its Origin and Development* (New York, 1904), pp. 165-7.

degree public inquiries in search of guilt or innocence and more like civil suits argued by two opposing sides before an unbiased court. The state was a mere plaintiff in a court of law.

In sharp contrast with the English method of conducting prosecutions is the so-called inquisitorial system which has prevailed on the continent of Europe. Primarily the product of the Roman and the Canon Law, this procedure throws upon the state the entire burden of enforcing the penal law through methods which are at once more secret, complex, scientific and perhaps "better adapted to the needs of social repression." *

The essentially litigious nature of English prosecution is shown by the fact that until comparatively recent times the costs in criminal proceedings were paid by private persons. There is, in fact, no power at common law to render judgment for costs in criminal prosecutions, either out of public funds or, as between the parties, in favor of either the complainant or the accused. Lord Hale once complained that this was very unfortunate because it made it difficult for a poor person, when injured, to secure redress. And Henry Fielding, the novelist, who inci-

* See A. Esmein, *A History of Continental Criminal Procedure* (Boston, 1913), chap. 1. For discussions of the French system see A. C. Wright, "French Criminal Procedure," *Law Quarterly Review,* Vol. XLIV, No. 175, p. 324 et seq. (1928), and J. W. Garner, "Criminal Procedure in France," *Yale Law Review,* Vol. XXV, pp. 255-284 (1916). On the success in Scotland of its universal system of public prosecutions see the testimony of Mr. James (afterward Baron) Moncreiff, Lord Advocate of Scotland, before the select committee of Parliament, *Parliamentary Papers* (1854-5), Vol. XII, p. 17 et seq. See also the *Edinburgh Review,* Vol. LXXXIII, p. 203 et seq., and for a more recent account, E. R. Keedy, "Criminal Procedure in Scotland," *Journal of the American Institute of Criminal Law and Criminology,* Vol. III, pp. 728, 834 (1913).

dentally was a London police magistrate in the eighteenth century, wrote out of a full experience:

"This I have known to be so absolutely the case that the poor wretch who hath been bound to prosecute was under more concern than the prisoner himself. It is true the necessary cost on these occasions is extremely small: two shillings, which are appointed by Act of Parliament for drawing the indictment, being, I think, the whole which the law requires, but when the expense of attendance, generally with several witnesses, sometimes during several days together, and often at a great distance from the prosecutor's home . . . are summed up, and the loss of time added to the account, the whole amounts to an expense which a very poor person already plundered by the thief must look on with such horror that he must be a miracle of public spirit if he doth not rather choose to conceal the felony, and sit down satisfied with his present loss; but what shall we say when (as is very common in this town) he may not only receive his own again, but be farther rewarded, if he will agree to compound it?" *

The first step in the direction of publicly supported prosecutions provided certain rewards for successful criminal actions. For example, there was the "Tyburn ticket," which was a certificate freeing the holder from the obligation of holding certain onerous parish offices.† Then, in 1752 was passed a law which recited that "many persons are deterred from prosecuting persons guilty of felony upon account of the expense" and provided that the court before whom any person had been tried and *convicted* of felony should have power, upon considera-

* "An Enquiry into the Causes of the Late Increase of Robbers," *Works* (London, 1903), Vol. X, pp. 465-6.

† See Chitty, *Treatise on Criminal Law*, Vol. I, pp. 821-24.

tion of the circumstances of the prosecutor, to order the treasurer of the county to pay him a reasonable sum not exceeding the expense he was put to in carrying on the prosecution, and a reasonable allowance for his time and trouble. The years that followed saw a long train of acts gradually extending the powers of judges to award costs in criminal proceedings, the latest statute dealing with the subject being the Costs in Criminal Cases Act, 1908,* by virtue of which the court of trial is now empowered to order the reasonable costs of the prosecution in all indictable offenses to be repaid out of public funds, the money being paid locally out of the taxes of the county or county-borough where the offense is committed. This authority may be exercised not only by the judges of the higher courts of trial but by police magistrates when disposing summarily of an indictable offense, or when holding a preliminary examination with respect to the same.

Thoughtful publicists and administrators who were interested in reforming the criminal law and perfecting its administration soon realized that legislative provisions for defraying costs would not suffice so long as injured parties were still required to wage unassisted their own battles for justice in the criminal courts. Early in the nineteenth century the great exponent of utilitarian philosophy, Jeremy Bentham, while engaged in advocating the reform of the barbarous and antiquated criminal law of his day, foresaw the need of publicly conducted prosecutions and included this among countless other projects of reform.†

* 8 Edw. VII, c. 15. See also 25 Geo. II, c. 36.
† See his *Works* (Edinburgh, 1843), Vol. IV, pp. 300, 384.

Bentham's proposal was not acted upon, however, and it was not until the middle years of the century that a movement was finally launched to overhaul the administrative machinery by providing for a system of public prosecutions to be conducted by local officials acting under the supervision and control of the central government.*

At this time the only officials who could be deemed in any sense public prosecutors were the Law Officers of the Crown (the Attorney-General and the Solicitor-General) and the Solicitor to the Treasury Department. The activities of the Law Officers were, and still are, largely confined to representing the Crown in lawsuits and conducting a few outstanding prosecutions. The Solicitor to the Treasury, while originally the legal adviser of a single department, had to an increasing extent been used by other governmental offices in prosecuting criminal cases. For example, shortly after the creation of the Metropolitan Police in 1829, London magistrates had fallen into the practice of binding over, or placing under bond, police officers to prosecute in the courts of trial cases in which complainants were lukewarm or subject to improper influences. In some of the graver and more difficult of these cases, where legal advice was necessary, the Commissioner of Police applied through governmental channels for assistance. In all such prosecutions the Home Secretary directed the Treasury Solicitor to advise with the police, present the evidence before the committing magistrate and instruct counsel to prosecute for the

* In the account which follows I have drawn upon an unpublished manuscript by Pendleton Howard, entitled *The Conduct of Criminal Prosecutions in England.*

Crown in the court of trial. It soon became the invariable practice of the Home Office to direct the Treasury Solicitor to prosecute in most important cases of murder, manslaughter, vicious assault, offenses against the coinage and other matters in which the government had a direct interest.

It was recognized by penetrating critics, however, that the partial system of public prosecutions which had been evolved informally through the gradual enlargement in scope of the functions of the Solicitor to the Treasury was a makeshift means of meeting a national problem. Beginning with the early fifties and running over a period of some twenty-five years seven different bills providing for the establishment of a system of governmental prosecutions were introduced and subsequently withdrawn in the House of Commons. During the same period several select committees and commissions, authorized by Parliament, issued their respective reports recommending one scheme after another for reforming the existing system of criminal law enforcement.* Advocates of change charged that there was no uniformity throughout the country in respect of the management of prosecutions, that criminal proceedings were often dropped or compounded, were sometimes instituted for vexatious reasons, that there was no adequate method by which the police

* See the minutes of the evidence given before the Select Committee on the Public Prosecutor's Bill, *Parliamentary Papers* (1854-5), Vol. XII, No. 481. See also the Fifth Report of the Judicature Commission, *Parliamentary Papers* (1874), Vol. XXIV, C-1090; the Public Prosecutor's Bill and Home Office Correspondence, *Parliamentary Papers* (1875), Vol. LXI, C-1319, and the evidence given before the Select Committee on the Office of Public Prosecutor, *Parliamentary Papers* (1884), Vol. XXIII, C-4016.

could secure legal advice in the early stages of their investigations, and that when complainants were unwilling or unable to employ skilled lawyers to conduct cases in court, inadequate preparation and bungling presentation resulted in the acquittal of many guilty persons.

In an article published in 1873 * the youthful James Bryce, then Regius Professor of Civil Law at Oxford, summed up the question in words that are not inapplicable to the United States at the present time:

"For the supervision of prosecutions, which it is now pretty well agreed the state must definitely accept as a part of its duties, there is required a central criminal office to receive the reports of the local Crown attorneys and the police in cases of any difficulty or importance, to advise on the propriety of prosecuting, on the nature of the evidence, sometimes also on the form of the indictment. Much expense and many failures of justice might thus be avoided, and we should avoid, too, what is hardly less an evil than the failure to convict a criminal—the needless prosecution of innocent persons, or persons against whom the evidence is plainly insufficient. . . . We have gone on long enough with makeshifts and fitful efforts. . . . What we need is chiefly machinery, system and foresight—the means of making available for the state's service that activity and skill which was never more conspicuously displayed in private enterprises."

The opposition to the movement for a more definitely centralized mode of conducting prosecutions was similar to that which, it may be anticipated, will greet certain suggestions presently to be made in this book with refer-

* "The Organization of a Legal Department of Government," *Fortnightly Review*, Vol. XIII, New Series, pp. 316-32.

ence to the American states. "Those opposed to the threatened innovation," writes a recent investigator, "pointed to the experience of other countries where, they charged, the control of the machinery for administering criminal justice had fallen necessarily into the hands of political parties and was being used by hordes of unscrupulous politicians to promote private or political ends. Private prosecutions, with all their accompanying risk of ineffective administration, were infinitely preferable, it was argued, to an enforcement of the criminal law which made the liberty of citizens dependent on the caprice or venom of party managers or public officials under their domination; surely that was not the way to promote an increased respect for law and constituted authority." *

All this agitation finally culminated in the passage of the Prosecution of Offenses Act of 1879,† which created the office of Director of Public Prosecutions and gave legal sanction to the limited system of national prosecutions which as we have seen had already grown up as the result of the great expansion of the duties of the Treasury Solicitor. ‡ While the act did not abolish private prosecution and failed to satisfy those reformers who had hoped for more drastic changes, there is no question but that it has been of immense practical importance in the subsequent development of English criminal procedure. The perfection of a speedy and effective method of conduct-

* Pendleton Howard, unpublished manuscript, op. cit.

† 12 & 43 Vict. c. 22.

‡ In 1884 the office was merged with that of Solicitor to the Treasury but in 1908 the two were again separated by the Prosecution of Offenses Act (8 Edw. VII, c. 3).

ing public prosecutions in important cases gave an impetus to many other substantial reforms, notably those in police administration, which have taken place during the last half-century. The English plan of organization and operation has, moreover, profoundly influenced the criminal system of Canada and the other self-governing dominions.

As already indicated, the English system places much more responsibility upon private persons than does the existing procedure in the United States. It is, in fact, hardly an exaggeration to say that English officials charged with the duty of enforcing the penal law have few powers not within the reach of the private individual. "A private person has just as much of a legal right to institute and carry on a criminal prosecution as have any of the law enforcing officers of the Crown. Nor is that all. After the proceeding has been instituted, the counsel who represents a private prosecutor, subject to one or two exceptions of no practical consequence, has exactly the same standing and rights in court as has the lawyer who represents the government and is conducting a public prosecution in its behalf. And not only may a person bring an action against another who has wronged him, but he may, again subject to certain exceptions, prosecute for a crime perpetrated upon his neighbor, although he may have no interest, pecuniary or otherwise, in the particular offense alleged to have been committed." *

In spite of the wide domain still left to private prosecuting initiative, the great majority of important criminal

* Howard, op. cit.

cases are now prosecuted either by the Director of Public Prosecutions or by the police.* Those instituted or taken over by the Director are "public" prosecutions in the strict sense of the term, while those carried on by the police are commonly referred to as "police" prosecutions. There is, of course, in a large number of these governmental and police prosecutions a complainant, or informer, who is usually the injured person; but this complainant may be, and usually is, either too poor to employ an attorney in his own behalf or too indifferent to interest himself in the conduct of the proceedings at all. It is in precisely such instances as these that the police are expected to intervene and assume the burden of bringing the offender to justice. Moreover, in the gathering and sifting of evidence and the preparation and presentation of the Crown's case the police are not only indispensable but almost wholly responsible. Thus, for all practical purposes the Commissioner of Police of the Metropolitan Police District of Greater London and the chief constables of the county and borough forces throughout England are active and experienced prosecutors.†

In carrying on their prosecuting activities the police receive direction, advice and assistance from several independent sources, depending on the court in which the prosecution is pending and the character of the case itself.

* See Sir Archibald Bodkin, "The Prosecution of Offenders: English Practice," *The Police Journal*, Vol. I, No. 3, p. 353, et seq. (1928). The writer is the present Director of Public Prosecutions. See also Albert Lieck, *Justice and Police in England* (London, 1928), chap. VII.

† See Sir Leonard Dunning, "Discretion in Prosecution," *The Police Journal*, Vol. I, No. 1, p. 39 et seq. See also Kenny, *Outlines of Criminal Law* (12th ed.), p. 533, note 2.

For example, in the courts of summary jurisdiction, or police courts, where the overwhelming majority of criminal cases is disposed of, the clerks to the justices usually assist in the examination of witnesses in order to insure that all competent and relevant evidence has been presented. Moreover, in cases of importance or difficulty, especially those arising in the cities and boroughs, the police are not infrequently represented by their own solicitors—sometimes the town clerk or one of his deputies or an official prosecuting solicitor employed by the corporation to conduct police prosecutions.*

In the case of indictable offenses which must be tried before a judge and jury, or which may only be disposed of summarily with the defendant's consent and he elects to be tried before a jury, the provisions made for prosecuting criminal cases in which the police are complainants depend in the main on the usage in the jurisdiction in which the offenses are committed. Those cases which come to the higher courts of trial from borough justices or from stipendiary magistrates in the larger cities, are in many instances prepared for trial under the direction and control of the town clerk of the borough, who is usually a solicitor or barrister of experience and serves as legal agent to the corporation. As indicated above, in some of the larger cities, such as Liverpool, Manchester and Birmingham, prosecutions of this type are managed by prosecuting solicitors who are employed by the several corporations to devote their entire time to the work. In a few

* The facts in this and the following paragraph are taken from Pendleton Howard, unpublished manuscript, op. cit.

cities these solicitors are under the supervision of the town clerks, while in other jurisdictions they are independent officers responsible only to the corporations. Prosecutions of like character which come to the courts of trial from the petty sessional divisions of a county are managed in most instances by solicitors nominated by the local police establishment or by the clerks to the committing justices. The trials of some of these cases, especially those disposed of on circuit and in the courts of quarter sessions for counties, are conducted by counsel freely chosen by the solicitors themselves; while in other cases, particularly those tried in the Central Criminal Court in London and in the courts of quarter sessions for the boroughs, an attempt is made to select counsel in rotation from among the members of the local Bar who are in attendance at the sessions.

The responsibility for public prosecution in England is divided among a number of members of the official family. Of outstanding significance, not because of his actual activity in enforcing the penal law but because of his high political and legal status and the importance of the few crimes which he does prosecute, is the Attorney-General. This official is the chief Law Officer of the Crown and as such is the *ex-officio* head of the Bar. Among many other duties he is required to prosecute for the Crown in certain cases of exceptional gravity and there are some classes of criminal actions which cannot be initiated without his sanction.* The Attorney-General

* No prosecution for incest can be commenced without the consent of the Attorney-General, except in cases initiated by or in behalf of the Director of

has the power, after an indictment has been found against a defendant, to enter a *nolle prosequi,* which has the legal effect of ending all judicial proceedings upon that indictment, although the accused may be subsequently reindicted for the same offense. This power of stopping a prosecution, which it is possible for the Attorney-General to use without consulting the private prosecutor, is exercised ordinarily in cases where the indictment cannot be sustained by legal evidence or where it appears for any reason that the interests of justice do not require that the defendant be brought to trial.

For the purposes of comparison with American practice it may be well to venture the generalization that by far the greatest part of the burden of supervising the administration of criminal justice in England falls upon the Home Secretary. In general he is held responsible for the maintenance of internal order. And almost invariably within recent years when Parliament has decided to invest the executive organs of the state with new powers in criminal matters it has placed such responsibilities within the province of the Home Office. Moreover, whenever Parliament seeks information with regard to the activities of the police or the administration of justice in the courts

Public Prosecutions (Punishment of Incest Act, 1908, 8 Edw. VII, c. 45, s. 6). Among other prosecutions requiring the sanction of the Attorney-General are serious cases of sedition and libel, certain offenses under the Lunacy Act, 1890, and other actions described in such Parliamentary Acts as the Public Health Act, 1875, the Prevention of Corruption Act, 1906, the Newspaper Printers Act, 1869, and a few others. He has, moreover, certain rarely used powers which are not possessed by other prosecuting officers. These are listed in Alexander, *The Administration of Criminal Justice in England and Wales* (Cambridge, 1919), pp. 135-7. For an account of the growth of the power and eminence of the Law Officers see Holdsworth's *History of English Law* (London, 1922), Vol. VI, pp. 457-472.

of summary jurisdiction, the Home Secretary is the official to whom the inquiry is directed. He bears the brunt of popular disfavor in any case where subsequent investigation discloses evidence of police oppression or the possibility of a miscarriage of justice.* He is expected to take steps to remedy the situation or explain the reasons for his inactivity.

The Home Office has direct control over the Metropolitan Police force of Greater London and a large measure of indirect control over all other police establishments through the exercise of its power to inspect these units and issue regulations prescribing their organization, equipment and discipline. The power to inspect was first given by a law passed in 1856† which provided that upon certificate from the Home Office that an efficient police force, in point of numbers and discipline, had been established in any county or borough, a subvention of one-fourth of the cost of the men's pay and clothing might be paid by the Treasury out of money provided by Parliament. The amount of the Treasury subvention was in 1918 increased to one-half of the entire police expenditure. Certificates entitling the country forces to the government bonus are issued upon the basis of reports of inspectors of constabulary appointed by and responsible to the Home Secretary. The right to prescribe regulations was effected by the Police Act of 1919.‡

* See the debates in Parliament concerning the recent unsuccessful police prosecution of Sir Leo Money and the subsequent interrogation of Miss Irene Savidge at Scotland Yard, *London Times*, May 18, 1928.

† County and Borough Police Act, 19 & 20 Vict. c. 69.

‡ 9 & 10 Geo. V, c. 46.

Prisons, Borstal institutions charged with receiving youthful offenders, reformatories and industrial schools are under the direction and control of the Home Secretary. He collects and publishes criminal statistics, appoints the police magistrates in the cities and the recorders of the courts of quarter sessions in the boroughs. The rules of procedure followed in all courts of summary jurisdiction, while nominally emanating from the Lord Chancellor, are actually drafted by the Home Secretary, as are regulations governing allowances to prosecutors and witnesses for the prosecution and defense under the Costs in Criminal Cases Act. The royal prerogative of mercy, manifesting itself in the grant of pardons, is in point of fact exercised by the Home Secretary in his capacity as adviser to the Crown, and upon him devolves the duty of deciding in all convictions for murder whether capital punishment shall be put into effect.

As we have seen, the officer directly charged with the prosecution of criminal offenses by public authority is the Director of Public Prosecutions. This official is appointed by the Home Secretary but is subject to the general superintendence and control of the Attorney-General. The Prosecution of Offenses Act of 1879 authorized the Director to institute, undertake or carry on criminal actions and give such advice to chief officers of police, clerks to justices or other persons, whether officers or not, concerned in any criminal proceeding respecting the conduct of such proceeding as might be provided for by suitable regulations under the act. Regulations drafted in pursuance of the authority of the act were to provide for

the institution of criminal proceedings by the Director in all cases of importance or difficulty or in which "special circumstances, or the refusal or failure of a person to proceed with a prosecution appear to render the action of such Director necessary to secure the due prosecution of an offender."

Regulations drafted in 1886 * provide that it shall be the duty of the Director to prosecute in all offenses punishable by death, in all cases (such as coinage offenses) which were hitherto undertaken by the Solicitor to the Treasury, in all matters where he is specially ordered to take action by the Attorney-General or a Secretary of State, and finally, "where it appears to the Director that the offense, or the circumstances of its commission, is or are of such a character that a prosecution in respect thereof is required in the public interest, and that owing to the difficulties of the case, or to other circumstances, the action of the Director of Public Prosecutions is necessary to secure the due prosecution of the offender." In addition to the classes of cases set forth in the regulations, the Director's powers as a prosecutor have been somewhat extended by subsequent legislation. For example, under the provisions of the Corrupt and Illegal Practices Act of 1883 † the Director is authorized to make such inquiries and institute such prosecutions as he may deem advisable in all offenses against the election laws. And in certain other cases his consent is necessary before prosecutions can be initiated

* S. R. & O., Rev. 1904, Criminal Procedure, Engl., pp. 7, 9; *Parliamentary Papers* (1886), Vol. LIII, Nos. 28, 28-I; 30 *Vol. J.*, 324, 633; 80 *L. T. N.* 341; 56 *J. P.* 602.

† 46 & 47 Vict. c. 51, s. 45.

by private persons or by the police. He is empowered, moreover, to take over the conduct of a private prosecution at any stage of the proceedings.* The importance of this provision lies in the fact that it enables the Director to intervene in cases where collusion, fraud or improper influences of any kind threaten to defeat the ends of justice.

Thus the intention of Parliament has seemed to be to turn over to the Director the conduct of all very important prosecutions, all cases having a political or governmental aspect, and certain other matters in which it was feared that criminal proceedings might be instituted with malicious intent. Its intention has also apparently been to leave the prosecution of the great majority of the ordinary run of cases involving the professional criminal class (such as robbery, burglary and assault) to the police, and the bulk of business frauds and larcenies in which those injured are capable of protecting themselves, to private complainants. Statistically this leaves most cases out of the province of the Director of Public Prosecutions. In the year 1926, for instance, the last year for which criminal statistics are available, 79,591 persons were charged with the commission of indictable offenses; of this number 69,695 were tried summarily by magistrates and 7,919 were committed for trial before a jury. During the same year the Director of Public Prosecutions conducted 572 prosecutions and the number of persons proceeded against was 725.† The importance of the Direc-

* Prosecution of Offenses Act, 1908, 8 Edw. VII, c. 3, s. 2 (3).
† Criminal Statistics, 1926, published by the Home Office, pp. 98-111.

tor's office does not depend, however, on the number of prosecutions he conducts but in the valuable assistance he renders the police and other law-enforcing agencies, in the aid he often furnishes to poor complainants and in the restraining influence he exercises over the activities of private prosecutors due to his power to intervene whenever he deems such action advisable in the public interest.

It is apparent from what has been said above that perhaps the most fundamental difference between American and English prosecution has to do with governmental organization. English prosecution in important cases is a national function. It is removed from all the difficulties involved in permitting a locally selected prosecuting attorney to wield within his area of jurisdiction the enormous powers of office. The other distinction is to be found in the decorum which prevails in the actual trial of cases in English courts and in the professional attitude and standards of conduct of contesting counsel. A very interesting American description of this aspect of English procedure was written in 1914 by a committee of the American Institute of Criminal Law and Criminology consisting of Professors John D. Lawson and Edwin R. Keedy:

"It has already been pointed out that prosecutions in England are of two kinds, public and private. In a public prosecution the government retains a barrister to act in that particular case. All the public prosecutions during a term of court may be conducted by different counsel, and it often happens that at a single term of court the same barrister may represent the Crown in some cases and the defense in others. In public prosecutions counsel for the

Crown is not a partisan whose sole aim is to convict. His function is to conduct an investigation to determine the guilt or innocence of the accused. In opening the case for the prosecution counsel generally states the circumstances favorable to the prisoner, as well as those tending to show his guilt. He also warns the jury of points of weakness in the prosecution's case; for instance, that the testimony of certain witnesses is open to suspicion. In cases where the prisoner's mental or physical condition is material, counsel for the Crown puts the prison doctor on the stand, and his testimony may dispose of the case in the prisoner's favor. If the prisoner has made a statement before the magistrate, this is read to the jury at the close of the evidence for the Crown as part of the prosecution's case. In some instances, when justice seemed to demand it, questions favorable to the prisoner were put to witnesses by counsel for the Crown. . . . In some cases where the prisoner pleaded guilty counsel for the Crown told of extenuating circumstances. The non-partisan attitude of the prosecution is more marked where the prisoner is undefended. It is provided by statute that in certain cases counsel for the prosecution must give notice to the defendant of matters that will be proved at the trial. . . . Where the prosecution calls witnesses whose depositions were not taken before the trial and whose names are not upon the back of the indictment, notice of intention to call such witnesses, with a copy of their evidence, should be given to the defendant and also to the trial court. . . . Counsel for the Crown defers very much to the judge. Sometimes during the trial the judge is consulted regarding the order in which witnesses for the prosecution are to be called, and is even asked if further evidence need be introduced. Counsel for a private prosecutor is more of a partisan than counsel for the Crown in a public prosecution, but can prejudice his case with judge and jury by a display of too much partisanship. The attitude of counsel for the defense generally appears to be that of one who is endeavoring to bring out facts tending to disprove his client's guilt, rather than to confuse the issue so as to make a decision

difficult, or to get error on the record which may be the basis of an appeal. This attitude is due to at least two causes,—one of which is the high standard of the profession; the other is the careful supervision by the judge of the proceedings at the trial." *

¶

So much has been said and written in recent years concerning the lessons which the United States may learn from Canada in criminal law administration that some comment here concerning Canadian prosecution may be helpful.† Perhaps the most fundamental difference between the criminal systems of the two countries lies in the fact that in the United States the penal law is for the most part the product of the state legislatures, while the penal law of Canada was by the British North America Act of 1867 assigned to the Dominion. It consists of a Criminal Code first passed in 1892 and since then recodified and frequently amended. The administration of this law, however, rests with the provinces. So far as procedure is concerned, crimes are classified as indictable and non-indictable rather than felonies and misdemeanors. Here the influence of recent English practice is plainly discernible.‡

* "Criminal Procedure in England," *Journal of the American Institute of Criminal Law and Criminology,* Vol. I, pp. 595, 748 (1914).

† An informative article on this subject is "Criminal Law in Canada," by W. R. Riddell, 10 *Minn. Law Review,* p. 557 et seq. (1926). See also the 1927 *Report of the Crime Commission of the State of New York,* pp. 85-94, and E. Bayley, "Canadian Criminal Law," 4 *Canadian Bar Review,* p. 552 et seq. (1926). A useful manual is Coral Wesley Topping, *Canadian Justice* (University of No. Carolina Press, 1928).

‡ Professor Maitland pointed out long ago that "in course of time the distinction (between felonies and misdemeanors) has become capricious, and

The Attorney-General of each province has large powers over the administration of criminal law. For example, in Quebec he is the chief Law Officer of the Crown and as such exercises a general superintendence over all matters connected with law enforcement in the Province. He is in person or through his deputies (the county Crown attorneys) the representative of the Province in criminal prosecutions. He is the administrative superior of the head of the provincial police. He advises heads of departments on matters of law, conducts litigation for or against the Crown or any public department, and exercises general supervision over the judicial organization of the Province.*

County Crown attorneys are appointed by the provincial governments, in reality by the provincial Attorney-General. Their duties are to conduct the prosecutions of criminal cases (initiated for the most part by the police or by private persons) before all courts except the Supreme Court, receive and examine informations, attend examining trials and coroners' inquests and in general perform the ordinary functions of local public prosecutors. In the Province of Ontario, for example, their several duties are listed as follows: (1) To receive and examine informations which justices of the peace and coroners are required to transmit to them, and where necessary, to cause the charges to be further investigated and secure additional evidence, as well as to insure the at-

of no great substance; that is to say, we know little about the punishment that a criminal will get when we know only that his crime is felony or (as the case may be) misdemeanor," *Justice and Police* (London, 1885), p. 16.

* For a full enumeration of the powers and duties of the Attorney-General see *Revised Statutes, Province of Quebec*, ch. 16, Secs. 1-6 (1925).

tendance of witnesses at the trial; (2) To institute and conduct for the Crown prosecutions for crimes in the Court of General Sessions of the Peace, and other local tribunals, in the same manner as the Law Officers of the Crown do at the High Court Division, with like rights and privileges, except as to the right of entering a *nolle prosequi,* and to attend to all criminal business at these courts; (3) To watch over the conduct of certain cases brought in the Court of General Sessions by private prosecutors in order to determine whether any particular case partakes more of the nature of a private injury than an offense against the public, and to assume wholly the conduct of the case where justice toward the accused seems to demand it; (4) To deliver to the Crown officer or counsel appointed by the Attorney-General all papers connected with the criminal business at Assizes (sittings of the High Court Division); (5) To hold themselves in readiness to help the Crown officer or counsel and in the absence of either to represent the Crown and conduct proceedings; (6) To institute and conduct summary proceedings before justices of the peace in certain cases (relating to public property, health, peace, and the like); (7) To advise justices of the peace if requested in writing to do so; (8) To supply forms for the use of justices of the peace; (9) Where bail is sought in an indictable offense to inquire into the facts and circumstances, to satisfy themselves as to the sufficiency of the sureties, and examine and approve all bail bonds entered into before justices of the peace or police magistrates; (10) To perform such other duties as are assigned by regulations in

Council, and (11) To advise coroners and attend their inquests if requested by the coroners in writing to do so.*

In the more sparsely populated sections of the Dominion such as British Columbia practically all prosecutions, outside of such centers as Vancouver, are prosecuted by an itinerant Deputy Attorney-General who is incidentally a full-time salaried Law Officer unlike the county Crown attorney. The county Crown attorney remains in private practice, his relationship to the government being very much like that of attorney and client. He may not, however, act as counsel for any person charged with the commission of crime. As explained by one of the Crown prosecutors of Montreal, Mr. Andrew R. McMasters:

"I occupy the position of one of the Crown prosecutors in Montreal. There is a senior Crown prosecutor and myself. We jointly occupy the office. We have an assistant, and some five Crown prosecutors. None of us devote our entire time to criminal law. We are active lawyers, and devote a certain part of our time to the prosecution of offenses which are brought before us, instituted by private prosecution. We have no office such as corresponds to the District Attorney who initiates in the United States prosecutions of his own motion. The criminal law is open to all who have recourse to it, and it is only after the instigation of the criminal law that the Crown lawyer is called upon to exercise his functions." †

Thus the Canadian prosecutor is in the position of counsel for the Crown who conducts a case in court only after the initiative of commencing the action has been

* See the *Revised Statutes of Ontario*, Vol. I, ch. 91 (1914).
† *Hearings of the Crime Commission of New York State*, p. 1381.

assumed by some one else—in some cases the injured party but, as in England, in most instances the police. Save in prosecutions of the most unusual character, such as murder, the public prosecutor does not appear on the scene of action until the case is already launched.

Once the case comes on for trial the attitude of the Crown prosecutor differs very materially from that of the American district attorney. As a noted member of the Montreal Bar expresses it: "Crown attorneys are not prosecutors. They are collaborators with the Bench. They conceive their duty to be the ascertainment of truth. We would not conceive for a moment the idea of expressing the work of a Crown attorney by the phrase, 'He has won his case,' or 'He has lost his case.' The Crown attorney in our notion of his duty never loses, and we take the view that he is a happy man when the jury reports that the Crown has been unable to show the guilt of the accused beyond a reasonable doubt." *

The demeanor in court of the Canadian crown prosecutor bears out this point of view. He does not "tear a passion to tatters." There are no shoutings at witnesses, no slighting and derogatory references to the accused, no appeals to the curious onlookers and few encounters with defense counsel. The proceeding has more the appearance of a dignified and serious official inquisition than a conflict between two parties with the court acting as a referee. There is no attempt at the concealment of evidence which might not help the cause of the prosecution. As a veteran Crown attorney remarked in a personal interview, "We

* Ibid., p. 1416.

show our entire hand. We feel that the Crown should present all the evidence of which it has knowledge. To fail to present pertinent evidence of which we are aware would constitute absolute grounds for appeal. We feel that because we are not a secret investigating agency and do not initiate prosecutions, there is no serious reflection upon us if we do not win a case. In fact, I don't give a damn whether I convict or not. It ought to be realized, moreover, that we are under strict discipline. On the one hand we are subject to the Attorney-General of the province; on the other hand we will, if we are derelict in the trial of a case, 'get hell' from the judge."

This forceful comment of a Crown prosecutor is given further point by a statement made by Mr. Justice Middleton of Toronto. "The Crown prosecutor," he says, "is supposed to conduct the case with scrupulous care and if he swerves from his duty he hears from the judge and loses caste as a member of his profession. I have known only one case where counsel behaved himself improperly. In this instance he got all that was coming to him and in addition I requested the Attorney-General of the province that this gentleman never be appointed to a court at which I presided." * At this point in the hearing to which we have already referred Justice Riddell interposed the comment that he himself had only known of one instance where a Crown prosecutor exceeded what seemed to be his strict duty, and in that instance the same punishment was meted out.

Even a casual acquaintance with the persons who serve

* *Hearings of the Crime Commission of New York State*, p. 1301.

as Crown prosecutors in Canada indicates that an excellent quality of ability is attracted to this office. They are, of course, appointed by the political government of the province and it is the custom to select for these offices persons whose political sympathies are in harmony with the dominant party. It is, however, equally clear that when once appointed these persons retain their official position regardless of changes in the complexion of the provincial government. In one province, for example, there have been only four Deputy Attorneys-General in charge of criminal prosecutions in the past twenty-six years. Of these, one left for private practice, one died, one is still in the department employed in another type of legal work, and the fourth is still in office. For the most part the term of service is long because apparently the honor which the office carries is sufficient to retain the service of a man whose private practice grows so large that his retention of the province as a client means a serious financial sacrifice. It is not customary to look upon the office as the means of advertising a struggling beginner in the legal profession. As we have indicated, in many instances cases are tried by representatives of the provincial Attorney-General's office who are not residents of the community where the trial is being held. There is very slight danger of local political pressure such as is common in the United States. In these cases it is possible for the prosecutor to resist the baneful effects of local hysteria. To quote again a Crown prosecutor: "No hope of reward or fear of punishment can affect his activities."

It should be added in conclusion that a distinct advan-

tage accrues from the fact that except where a municipal police department is concerned the prosecuting and the police machinery are generally subjected to the same general supervision. The vexatious lack of harmony among the various peace officers separately elected in the counties of the United States does not obtain in Canada.

CHAPTER X

REFLECTIONS UPON REFORM

IT would be pleasant to select as the title of this concluding chapter some such happy promise as "The way out" and conclude a none too favorable description of American criminal law enforcement with a prescription for reform. It would not only be pleasant to do so, it would be easy. And it would turn aside the condemnation of the stern American who demands "something constructive" as the sequel to something unpleasant. We are for the most part reformers, be we business men, lawyers, social scientists, social welfare workers or teachers. Particularly so if we are academic persons! A contemporary has pointed out that "there is no economist who does not dream of stabilizing currency and correcting the tidal flow of business cycles, nor sociologist who does not contemplate the ultimate elimination of every social 'case.' Hence the theory of progress, or, as pedants call it nowadays, social control." * To this we may safely add that few lawyers see any value in raising such questions as are suggested in the foregoing paragraphs without adding to them a "legislative program," and almost every business man demands that every disagreeable recital of realism

* Ayres, *Science the False Messiah* (New York, 1928), p. 206.

have a something "constructive" attached. Thus everywhere is made the demand for a happy ending.

Proposals for the reform of an administrative process so involved in political complications as the one considered in this book would of necessity be so tentative as to have little value for the legislator or administrator. A few rather simple mechanical changes are currently proposed by intelligent critics of the present order and they will probably secure practical recognition without great delay. The ultimate problems, however, are seriously involved in a deep cultural stratum that will show little modification in this generation.

This must be particularly true of those aspects of public administration which are concerned with such a scientifically unknown quantity as crime. No aspect of social life is so untouched by rationally accepted standards and so colored by basic prejudice and folk-lore. Poverty may come to be regarded as a collective responsibility but to view crime with the behaviorists is to strike at moral and religious values very precious in the eyes of most of those who rule the world. Those who speak and write of crime range in view-point from Judge Marcus A. Kavanaugh who holds that it is "a demonstrable, scientific truth, that it is not the weakness of the human mind that makes a criminal, but the wickedness of the human heart," * to Professor Harry Elmer Barnes who says that "there is not the slightest iota of freedom of choice allowed to either the criminal or the normal citizen in his daily conduct." †

* *The Criminal and His Allies* (New York, 1928), p. 62.
† *The Repression of Crime* (New York, 1926), p. 24.

The two schools thus represented are quite honestly divided, of course, upon the age old question of human responsibility. In the face of the fierce and apparently indecisive battle between them, the average citizen still falls back upon his prejudices. This is quite interestingly shown in the results of an inquiry recently made by the New York State Crime Commission. To determine, if possible, whether there was even approximate agreement among men and women of affairs a list of forty commonly mentioned "causes" of crime was sent to two thousand citizens of New York State with the request that there be indicated the relative importance of the "causes" thus listed. The inquiry went to members of eleven professions: educators, social-workers, teachers, engineers, clergymen, authors, newspapermen, physicians, judges, lawyers and business men. A tabulation of the returns revealed two facts which indicate in some degree the great distance which must be traversed before we shall be able by means of concerted public action to make much progress in dealing with crime. One fact was the general agreement upon the importance of the "social" causes of crime; "bad companionship" and "declining respect for authority" being the "causes" most commonly assigned by those replying. This means that with such general agreement by these representatives of public opinion that social and not individual defects cause crime, the "attack" upon crime must come through changing society, a fairly large job.* The other fact shown by the replies was the

*I do not deny that those replying would, if they should elaborate upon their answers, say that both individual and environmental factors enter into

quite explainable emphasis which each profession placed upon the "causes" with which it is specifically concerned. A listing of the first four "causes" selected by the professions indicates this: *

Newspapermen:	1. Delays in the administration of justice. 2. Declining respect for authority. 3. Leniency to criminals. 4. Bad companionship.
Clergymen:	1. Bad companionship. 2. Lack of home supervision. 3. Declining respect for authority. 4. Newspaper publicity given to crime news.
Engineers:	1. Delays in the administration of justice. 2. Leniency to criminals. 3. Declining respect for authority. 4. Bad companionship.
Business Men:	1. Bad companionship. 2. Declining respect for authority. 3. Lack of home supervision. 4. Leniency to criminals.
Judges:	1. Bad companionship. 2. Declining respect for authority. 3. Delays in the administration of justice. 4. Desire for adventure.
Lawyers:	1. Delays in the administration of justice. 2. Bad companionship. 3. Leniency to criminals. 4. Declining respect for authority.

the making of delinquency. I am simply stating the emphasis upon environment.

* The detailed results of this questionnaire were contained in a news release issued by the "Sub-Commission on Causes" of the Crime Commission of New York State in 1927.

Teachers: (Grammar and secondary)	1. Bad companionship. 2. Lack of home supervision. 3. Declining respect for authority. 4. Leniency to criminals.
Social Workers:	1. Lack of home supervision. 2. Bad companionship. 3. Unsupervised spare time. 4. Lack of wholesome recreation facilities.
Authors:	1. Newspaper publicity given to crime news. 2. Bad companionship. 3. Declining respect for authority. 4. Lack of home supervision.
Educators: (College Presidents and Professors)	1. Lack of home supervision. 2. Declining respect for authority. 3. Bad companionship. 4. Newspaper publicity given to crime news.
Physicians:	1. Bad companionship. 2. Declining respect for authority. 3. Inheritance of criminal tendencies. 4. Leniency to criminals.

While the newspapermen constitute an interesting exception, it will be noted that the "causes" assigned by each group has a definite relation to the interests of that group. Thus the "causes" of crime are ascribed to some unsatisfactory condition within the immediate experience of the person who makes the guess.

The presence of such diverse and confessed popular conceptions of crime, its causes and treatment is reflected in the administration of criminal law. It is idle to say that the administrator is concerned only with the application of a fixed criminal law, with the philosophy of which he

is not concerned. The law in fact is not so fixed as it appears and in its application the prejudices and preconceptions of the administrator may enjoy quite ample scope. Legislator, judge and prosecutor, quite without realizing it, apply their own conceptions of punishment or treatment. To this confusion is added the pervasive influence of politics with a resulting brew that does not subject itself to simple definition.

In the face of this divergence of opinion, characteristic not only of the layman but the expert, the mere commentator upon a single aspect of dealing with the criminal may well hesitate to draw too confidently a schedule of reform. It will suffice to offer here a few observations concerning some currently notable tendencies, leaving the more exacting task of prescription to more practiced, more capable and, above all, more hopeful observers.

It is inevitable that the prosecuting function will come to be vested to a greater and greater degree in the state government, probably in the attorney general. There is evidence of this, not only in the invariable tendency in American states to increase the functions of the state government at the expense of the counties in matters that become state-wide in nature, but in the beginnings which certain states have made already in vesting criminal prosecution in the attorney general. Provisions have been made, as we have indicated, to vest power in the governor to supplant county prosecutors in certain prosecutions, other states have given the attorney general supervision of a general character over county prosecutors, others have required the publication of reports by the attorney general,

based upon data furnished by the county prosecutor, others provide that the attorney general represent the state in criminal appeals and there has, of course, been the important development of state police, identification, and detective services. There is no reason to suppose that this tendency toward the centralization of prosecution will end until there is established a central prosecuting office directly under the governor or in the office of the attorney general, which will to a great extent conduct the prosecution of at least the more important felonies throughout the state. The abandonment of prosecution as a county function may be made more certain by the growing realization that a great proportion of the counties of the United States have difficulty in filling the office at all. In many counties there is not a single lawyer and in a vast number there are not more than two or three. In many instances the office practically goes by default, term after term, to the incumbent.

Another possibility is the development of more prosecuting machinery within the larger police departments. As has been shown in the preceding chapter, a great deal of prosecution in England is conducted by the police. It is quite probable, if the state assumes the initiative in the prosecution of the more serious cases, that the vast majority of less important cases will ultimately come to be prosecuted by the police. This would, of course, contemplate the development within the larger police departments of law offices for the preparation and presentation in court of prosecutions which are initiated within the police department.

Another suggestion commonly made, which may result from the creation of state-wide prosecuting machinery, is the formation in state governments of a glorified attorney general, or as is suggested in some recent literature, a Ministry of Justice, inclusive of all such functions as are now exercised by coroners, sheriffs, prosecutors, and state police, with perhaps the further inclusion of correctional institutions. This is, it would seem, merely a step in the direction of centralization of administrative services which has already been so prominent in American states.* One seeming advantage in this kind of a state administrative scheme is the possibility of centralizing in one state office certain very important but infrequently used techniques of great significance to prosecution. It should be noted, however, without unduly prejudicing the suggestion, that the creation of a new state department, even with so high sounding an appellation as a Ministry of Justice does not assure more freedom for such a department from the old political influences.

In marked contrast with those who advocate measures to strengthen the administrative agencies charged with prosecution are those who believe that the interests of society are better preserved by weak prosecution. An eminent American criminologist remarked in discussing the "efficiency" of criminal justice that a more efficient process establishing guilt will merely add to the social injury of our present system of penal treatment. To this objection should be added that of the person who fears

* See Moley—*The State Movement for Efficiency and Economy* (New York, 1917). Also Buck—*Administrative Consolidation in State Governments*, 3rd ed. (New York, National Municipal League, 1924).

the dangers of strong prosecution to individual liberty. "Why," asserts this point of view, "should so insistent a demand for efficient prosecution be made? May not prosecution become so effective as to defeat the most precious purposes of justice and by its superiority over the average defense result in the conviction of the innocent as well as the guilty?" The answer to this is in the experience of England and Canada where well equipped and trained prosecutors and police temper themselves with regard for the rights of the defense. It is not the strong, well trained police departments that abuse citizens. The police of a certain city in the United States were during a certain period most incompetent and inadequately manned. The number of citizens killed by police in the city in one year was as large as the entire homicide rate in London in a year. It is the police department that is losing its battle with its job that becomes panicky and dangerous to the innocent as well as to the guilty. In like manner the strong, well poised, confident prosecutor will probably more wisely exercise his discretion than the weak one who, unable to win cases on their merits, under public pressure and fearful of his "record," will easily fall into the most questionable practices.

To some extent the sordidness of the picture of county prosecution is accentuated by the fact that no traditions of fine public service have yet been developed in this political frontier. Almost the sole influence of the past upon the present is the exciting example of brilliant political successes growing from the public attention given to unusual prosecutions. The effect of this is to bring

about the appraisal of every official act in terms of publicity values. Ethical standards attaching to this particular branch of public service are therefore primitive and indefinite. None of the guiding and restraining influence of a slowly evolving code of official conduct has yet begun to affect it.

The great and apparently enlarging area of private prosecution in the United States profoundly influences the attitudes and methods of public prosecutors.* A single day's service on a grand jury reveals to the average citizen the vast range of prosecuting activities which are conducted by private agencies. The legal representative of a humane society comes to ask for indictments of deserting husbands and fathers, the retail merchants' board presents evidence of forgeries, "better business commissions" ask for "blue sky indictments," automobile clubs present prepared prosecutions against automobile thieves, banks ask for the indictment of dishonest employees, and many other special interests ask for the formal public approval of what is really a private prosecution. The dependence of the American upon private initiative in prosecution is surprising when we consider that he is so disposed to pass laws and create public commissions covering almost every conceivable aspect of human activity. Andrè Siegfried in his revealing analysis of American political life comments upon "the extraordinary way in

* In spite of the important relationship of private prosecution to the subject matter discussed in this book we limit ourselves to a few comments upon it. I hope at some other time to discuss these generalizations at greater length, particularly those which concern crime commissions and other associations of a more restricted character.

which the State legislatures supervise the customs of the people even to the smallest details," and also that "in this country where the chief lever is group initiative, every movement sooner or later crystallizes in a committee, an association or a league . . . nowhere else in the world are associations so powerful as in the United States." * The inconsistency of a people which at once depends upon a vast amount of governmental regulation and at the same time organizes itself in non-governmental associations for everything that it deems important is apparent rather than real. The great amount of legislation is largely the result of the associations, and the latter must be kept in constant motion to assist a rather feeble public administration in carrying out its vast burden of duties. The state legislatures are willing to pass laws in any desired quantity but usually they are too penurious to provide the administrative facilities to enforce them. Hence they willingly permit enforcement to be taken over by private initiative. The plain fact is that no group and few individuals have any considerable amount of confidence in public prosecutors or public prosecution. Whenever a case arises in which they have a genuine stake they prepare their own cases and conduct, so far as they can, their own prosecutions. Public officials are permitted to act as formal agents of the state and to take public credit for their formal acts but the actual work is done by private individuals.†

* *America Comes of Age* (New York, 1927), pp. 240-244.

† It was reported in the press that in a recent instance where a railway hold-up had resulted in the murder of railway employees, the corporation injured spent nearly a quarter of a million dollars in catching and prosecuting the criminals.

The Chicago Crime Commission is an interesting example of an association whose primary purpose is the stimulation of prosecutions but whose scope of interest goes beyond a single type of crime. In 1919 the Chicago Association of Commerce, alarmed by the apparent increase of crime in that city, brought about the creation of the Commission. The stated purposes of the Commission were so broad as to include a general interest in crime and in the administration of criminal justice. The theory behind the Commission was coöperation with public officials. It assisted them whenever possible in the performance of their work and occasionally suggested new methods of administration and organization. The significant part of its work, however, was a sort of surveillance over the processes of prosecuting felony cases in the courts. The Commission from the beginning has maintained in its own office a docket with the record of every felony case initiated in the courts of Cook County, and every step which is taken in regard to each of these cases is entered upon the record. Thus, the Commission is able through the use of this record to keep careful account of every formal step in every criminal prosecution. It is thus able to call to the attention of appropriate officials any features of these prosecutions that seem unsatisfactory. In addition to this "card index of crime" the Commission keeps representatives in the courts at all times, whose duty it is to watch things that happen and to report them to the Commission. These observers are the "eyes" of the Commission, and the function which they serve is not unlike that of newspaper reporters stationed at places

where matters of interest may develop. The Commission has thus constituted itself as a voluntary citizen organization which maintains constant watch over the administration of justice. Its chief purpose has been to stimulate more activity in criminal prosecutions and in certain specific cases it has been very effective.

Other cities in which business men and lawyers were dissatisfied with the vigor of public prosecutions have established similar organizations. Among these are Baltimore, Cleveland and Dallas. For a time, Los Angeles had such a commission. Such commissions have been criticized by those who hold a humanitarian view of crime and its treatment as being mere prosecuting agencies without regard to the kind of persons who are being prosecuted or the social value of convicting them. This criticism is, for the most part, justified, if we assume that there is small value in the conviction of accused persons. They have undoubtedly served to increase the vigor of prosecution, to stimulate public officials to make more active efforts to secure convictions, and they have performed a certain type of public education in bringing to the attention of the public through reports and newspaper releases facts concerning crime and criminal justice.

Another kind of voluntary private activity in connection with crime may be classed under the head of research. As we have seen in the foregoing chapters, a number of "surveys" of criminal justice have been made, particularly in Cleveland, Missouri, New York, Georgia, and Illinois. These activities could hardly be classed as private prosecution, because their primary purpose was to

add to the sum total of knowledge concerning the administration of criminal justice. They were not pieces of research that arose from the untroubled and disinterested atmosphere of a scientific laborer. They were on the other hand efforts by private individuals, in communities in which crime had become a seriously discussed subject, to gather together facts concerning crime and the enforcement of criminal law in a particular community for the purpose of assisting these private agencies in drawing up a number of recommendations for change, particularly legislative change.

Seen in retrospect, these "surveys" of criminal justice have served chiefly as means of providing material for public discussion of the entire problem of crime. In this respect, they have made their chief contribution in the field of enlightening public opinion, because for the most part the facts and conditions which they have shown have not been startling or unusual. A second value has been their scientific character. They have provided for serious students of criminal law administration a body of information which it is possible to use in comparative studies and thus to remove from the discussion of crime and its treatment some of the prejudices with which it is so full.*

* A number of official crime commissions have been created within the past few years, most of them being the result of legislative action, and in many cases composed of a membership including not only citizens appointed by the governor but members of the legislature. The one which has been in existence for the longest time and which has been provided with the most adequate budget is the Crime Commission of New York State. The printed reports of this commission constitute in themselves a "survey" of criminal justice in the State of New York, and its work has constituted an advance upon the other surveys which we have mentioned, in that it includes several studies of the causes of crime. In New York as well as elsewhere, the chief contribu-

The various surveys of criminal justice to which allusion has frequently been made in this book have performed a useful service for research, although in the form in which they appeared they did not in all cases provide the interpretation of the facts which they disclosed. They placed data before the people, who may be induced to reflect and venture conclusions of a quite different character from those presented by the surveys themselves. These new interpretations, it is to be hoped, may be more seasoned, more sound and more useful. This criticism and this conclusion may be applied to much of the research now being done in the field of social science. Apparently through the foundations and well financed associations and organizations of one sort or another there are being provided large sums for what is popularly called research. It will not help to quarrel here over the meaning of "research" except to say that many reflective persons have expressed doubts as to the validity of applying the term to much of the fact-gathering that is now so well supported and encouraged.* The fact is that vastly expensive machinery is gathering facts concerning governmental operation and social behavior on a scale never before known. These facts do not impede the progress of the independent genius of the future in his work but they provide materials which should assist him in constructive and inventive thinking in ways that were closed to Bentham, Hobbes and Rousseau. This book attempts to call atten-

tion of the Crime Commission has been the proposal of a list of legislative measures.

* See *Foundations, Universities and Research* by Harold J. Laski in *Harper's Magazine* for August, 1928.

tion to, rather than in itself realize upon, the possibility of using the accumulations of facts which have been published to draw better and more seasoned deductions from the spade work of others.

The student of criminal law administration is inevitably brought to the conclusion that, to a degree not easily perceived by the practicing lawyer and public official, the whole task of dealing with crime is not one for which the traditional processes of law are suitable. The slow but irresistible development of scientific thought concerning the criminal compels a greater individualization of treatment than a general law will permit. Hence the adoption of legal subterfuges which "like the judgment of Agesilaus will save both the law and the criminal." * The practice of accepting pleas to a lesser offense is a clumsy and undesirable device, it is true, but it is in part made necessary by the need for individualizing—making the punishment fit the criminal rather than the crime. To a greater extent we may expect to find the common sense of officials breaking the bounds of legal devices which have outlived the philosophy which created them.

The ultimate result of politics in prosecution is the presence of prosecution in statesmanship. As is indicated in many places in this book, the county prosecutor's office provides the initial training for American political careers. It is an interneship for young statesmen. And such is the force of this training that when these men reach

* See a comment on this point by Professor John Barker Waite in 27 *Michigan Law Review*, 78.

their heart's desire as successful public figures they are in method, manner and mental bent, prosecutors still. Their psychological patterns are those of the formative years of their political apprenticeship. This is a fact which is revealed when we consider the more notable characteristics of such an institution as the American Senate. As a forum for the expression of finely conceived political philosophy or of noteworthy oratorical expression it leaves something to be desired. But most of those who have given discriminating attention to its achievement have recognized as its most significant contribution distinct ability to discover and expose governmental and corporate wrongdoing through the examination of witnesses, and the tireless pursuit of other types of evidence. Senatorial discussion of foreign policy, or fundamental constitutional theory, may not elicit the highest praise from competent critics, but Senatorial attack and defense when official miscreants are before the bar of opinion have seldom failed to elicit admiration as well as eager interest. Except for the Smoot-Aldrich type of quiet business efficiency and for Lodge, the lone "scholar in politics," it must be recognized that eminence in the Senate of this generation has gone to a group whose contribution has been greatest in activities which were in their nature criminal prosecutions either of individual office holders or of private corporations.

The most effective opposition which recent administrations have had has been furnished by men of this type. We shall not name these Senators here, they are well known to every observer, and they are not only lawyers but former prosecutors. The old observation that America

has government by lawyers may be qualified to say that we have government by prosecutors.

This is compensation for using the instrumentalities of prosecution in our cities and counties to further the interests of politics. Whether it is to be considered sufficient compensation for such a sacrifice must depend upon our conception of the relative values concerned.

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